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PROCEEDINGS AND ORDERS

DATE: 050385

CASE NBR 84-1-06030 CSY
SHORT TITLE Glass, Jimmy L.
VERSUS Louisiana

DOCKETED: Dec 13 1984

Date	Proceedings and Orders
Oct 24 1984	Application for extension of time to file petition and order granting same until December 13, 1984 (White, October 25, 1984).
Dec 13 1984	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jan 24 1985	Brief of respondent Louisiana in opposition filed.
Jan 31 1985	DISTRIBUTED. February 15, 1985
Feb 25 1985	REDISTRIBUTED. March 1, 1985
Mar 11 1985	REDISTRIBUTED. March 15, 1985
Mar 25 1985	REDISTRIBUTED. March 29, 1985
Apr 15 1985	REDISTRIBUTED. April 19, 1985
Apr 22 1985	REDISTRIBUTED. April 26, 1985
Apr 29 1985	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Brennan with whom Justice Marshall joins. (Detached opinion.)

CONTINUE {

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PETITION FOR WRIT OF CERTIORARI

EDITOR'S NOTE

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IN THE

Dec. 13, 1984

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

(2)

NO. 84-6030

JIMMY L. GLASS,
Petitioner,

VS.

STATE OF LOUISIANA
Respondent

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF LOUISIANA

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QUESTIONS PRESENTED

I.

WHERE THE JURY RELIED ON FOUR AGGRAVATING CIRCUMSTANCES, TWO OF WHICH WERE ENTIRELY UNSUPPORTED BY THE EVIDENCE AND THE REMAINING TWO WERE ELEMENTS OF THE CRIME OF FIRST DEGREE MURDER IS THIS CASE DISTINGUISHABLE FROM ZANT V. STEPHENS, ___U.S. ___, 103 S. Ct. 2733 (1983) AND SHOULD NOT THIS CASE BE REVIEWED ON ITS OWN MERITS UNDER THE STANDARDS OF FURMAN V. GEORGIA, 408 U.S. 238, 92 S.Ct.2726 (1972) AND STROMBERG V. CALIFORNIA, 238 U.S. 359, 51 S.Ct 532 (1931)?

II.

WHERE A POLICE OFFICER TELLS A PRISONER WHILE ON AN AIRLINE FLIGHT THAT THE PRISONER MAY WRITE A LETTER TO HIS MOTHER AND FURNISHES THE PRISONER A PAD AND PEN AND, UPON COMPLETING THE LETTER, THE PRISONER ASKS THE OFFICER IF HE WANTS TO READ IT AND THE OFFICER RESPONDS THAT HE DOES NOT NEED TO READ THE LETTER WHEREUPON THE PRISONER FOLDS THE LETTER AND WRITES HIS MOTHER'S NAME ON THE OUTSIDE AND HANDS THE FOLDED PAPER TO THE OFFICER WHO ASSURES HIM IT WILL BE DELIVERED, DOES THE PRISONER HAVE A REASONABLE EXPECTATION OF PRIVACY IN THE CONTENTS OF THE LETTER UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION SO THAT A LATER SEARCH AND SEIZURE OF THE CONTENTS OF THE LETTER WITHOUT A WARRANT OR ANY LEGITIMATE STATE INTEREST IN INSPECTING THE CONTENTS WAS UNREASONABLE AND WAS THE DERIVATIVE USE OF A STATEMENT THEREIN WAS SO PREJUDICIAL REVERSAL WAS REQUIRED?

III.

DOES THE DEATH PENALTY VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE FUTURE DECISIONS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT MAY APPLY TO PETITIONER'S CASE AND WHERE SUCH DECISIONS MAY BE GIVEN RETROACTIVE EFFECT ENTITLING PETITIONER TO A NEW TRIAL BECAUSE PETITIONER'S EXECUTION WOULD PREVENT HIM FROM ENJOYING SUCH FUTURE RELIEF AS WOULD A PRISONER SERVING A LIFE SENTENCE? AND DOES THE METHOD OF EXECUTION EMPLOYED BY LOUISIANA ALSO VIOLATE THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE ELECTROCUTION CAUSES HTE GRATUITOUS INFLICTION OF UNNECESSART PAIN AND SUFFERING AND DOES NOT COMPORT WITH EVOLVING STANDARDS OF HUMAN DIGNITY?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

JIMMY L. GLASS

Petitioner

VS. No. _____

STATE OF LOUISIANA

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

Petitioner, JIMMY L. GLASS, requests that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana in State of Louisiana versus Jimmy L. Glass, 455 So.2d 659 (La. 1984).

JIMMY L. GLASS is currently under sentence of death in the State of Louisiana.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Louisiana was rendered on May 14, 1984 Rehearing Denied September 14, 1984. The Supreme Court of Louisiana affirmed the judgment of the 15th Judicial District Court, Parish of Lafayette, Ronald D. Cox, presiding, upholding Petitioner's conviction of First Degree Murder and Death Sentence. The opinion below is attached hereto as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). On October 25, 1984, Mr. Justice White granted an application for extension of time to file this petition for writ of certiorari, until and including December 13, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States.

This case also involves the following provisions of the Louisiana Codes, the texts of which are contained in Appendix B attached to this petition:

Louisiana Statutes Annotated R.S. 14:30
Louisiana Code of Criminal Procedure Articles 905 et. seq.
Louisiana Statutes Annotated R.S. 15:569

HOW THE ISSUES WERE RAISED BELOW

Each of the constitutional issues in the Questions Presented above were raised in the trial court, and on appeal to the Louisiana Supreme Court on direct appeal; all were decided adversely to Petitioner.

STATEMENT OF THE CASE

(i) Statement of Facts

The facts as adduced at trial and as summarized by Louisiana Supreme Court are as follows: Petitioner Glass, who was in prison following his conviction and sentence for armed robbery, and one Jimmy Wingo, who was awaiting trial on two counts of burglarly, escaped from the Webster Parish Jail in Minden, Louisiana, on Christmas Eve, December 24, 1982. Around eight o'clock that evening, the two men were being allowed to make telephone calls to their families. When the deputy had to leave them unattended momentarily, because of a disturbance in the cells, they descended in the elevator and escaped.

What happened at the crime scene comes largely from the trial testimony of the Petitioner. According to Glass the escape was Wingo's idea. Once outside, the two men made their way from Minden to Dixie Inn, Louisiana, for the most part walking through fields. Petitioner testified that they came out on a road and found some kind of business and a house (with no one evidently at home). As they tried to enter a window at the back of the house, a car turned into the driveway. According to Glass' testimony the duo watched Mr. and Mrs. Brown get out of the car and go into the house. Since the keys were not left in the parked car, Wingo decided to check out the storeroom located in the carport area. He found a refrigerator containing beer.[1]* They retreated beyond the hedge and drank beer. According to Glass' testimony Wingo decided that they should wait until the couple went to sleep, smash the patio door, then go in, surprise the couple, and tie them up. During the planning and drinking, Glass also consumed some champagne.

---

[1] * According to [illegible]ner, Wingo also found gloves in the storeroom which he wo[illegible]

The Petitioner testified that, pursuant to Wingo's instructions, he cut the telephone wires with a pair of hedge clippers and threw a piece of petrified wood through the glass of the patio door. Glass and Wingo then opened the door, entered the house and ran down the hall to the bedroom where they found Mrs. Brown standing on the side of the bed screaming and Mr. Brown lying in the bed. Mr. and Mrs. Brown were told to lie face down on the bed. By that time Wingo had acquired a shotgun and rifle. Petitioner Glass rooted through the man's billfold and through various furniture drawers, etc. In the nightstand drawer Glass found .38 caliber shells. He asked Mr. Brown where the pistol was kept and was told that it was in the closet. He went to the closet where he found the gun. While searching for the gun Glass cut his thumb on a saw that was on the closet shelf.[1]* Mrs. Brown told Petitioner Glass the location of her purse which he then emptied in the living room. As Petitioner looked through other rooms for possible loot, he called out Wingo's name and asked him what to do next. Wingo told Glass to shut up. After taking liquor from the kitchen cabinet and putting it in the back seat of the Browns' car, Petitioner was allegedly told by Wingo that he, Glass, had to kill the couple, who had been bound and gagged, since Glass had called out Wingo's name when they were in the house.

Petitioner testified that Wingo poked him in the back of the head with the shotgun barrel and told him that he was to kill them, or Wingo would "splatter [his] brains all across the room." Glass testified that Wingo kept the shotgun at Petitioner's neck or back as Glass made his way

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[1] * Petitioner's fingerprints were found on the saw. There is only Petitioner's testimony to the effect that he was forced to kill the two victims

back to the bedroom. Then Glass allegedly put his knee on the foot of the bed, more on the man's side, bent over, closed his eyes and pulled the trigger. As the woman raised her head and started to scream, Petitioner allegedly pointed the gun, closed his eyes, and pulled the trigger. Glass testified that, before leaving the room, he pulled the covers up over the victim's heads.

Wingo and Glass then took the Browns' car toward Vivian, Louisiana, so that Wingo could see his girlfriend. In Vivian, the two men were forced to abandon the car which had broken down after hitting high water which had flooded the road. The pair walked to the house of Wingo's sister and picked up Gwen Hill, Wingo's girlfriend, and spent a day in the woods. Glass testified that the three then took a truck and drove to Atlanta, Texas, where Wingo and Gwen stayed in a motel room, while Petitioner took the truck and went on to Little Rock, Arkansas, and eventually to a friend's house. In the meantime, state troopers began looking for Glass. He then allegedly took a bus to Ventura Beach, California. From there he went to San Diego where he was eventually picked up.

Dr. George McCormick, the pathologist, testified that both victims died as a result of a laceration of the brain due to a single gunshot wound. The bullet entered Mr. Brown's head on the right side of the back of the head and exited on the left side of the forehead. The bullet entered Mrs. Brown's body and exited above the right eyebrow. Both were contact wounds, according to the pathologist.

The pathologist testified in rebuttal that it would have been impossible for Petitioner to be so positioned when he shot the couple. The doctor had originally testified that the killer had most probably been positioned in the bed between the two victims.

Petitioner Glass' fingerprints were found on the Browns' Lincoln Continental when it was recovered.

REASONS FOR GRANTING THE WRIT

I.

WHERE THE JURY RELIED ON FOUR AGGRAVATING CIRCUMSTANCES, TWO OF WHICH WERE ENTIRELY UNSUPPORTED BY THE EVIDENCE AND THE REMAINING TWO WERE ELEMENTS OF THE CRIME OF FIRST DEGREE MURDER THIS CASE IS DISTINGUISHIBLE FROM ZANT V. STEPHENS, ___ U.S. ___, 103 S. Ct. 2733 (1983) AND SHOULD BE REVIEWED ON ITS OWN MERITS UNDER THE STANDARDS OF FURMAN V. GEORGIA, 408 U.S. 238, 92 S. Ct. 2726 (1972) AND STROMBERG V. CALIFORNIA, 238 U.S. 359, 51 S.Ct. 532 (1931).

These arguments relate to the total lack of proof to justify the jury's findings, during the penalty phase of the trial, of the aggravating circumstances set forth in Art. 905.4(F)(G), La.C.Cr.P.

Art. 905.4, La.C.Cr.P., provides in relevant part:

> The following shall be considered aggravating circumstances:
>
> . . . . . .
>
> (f) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;
>
> (g) The offense was committed in an especially heinous, atrocious, or cruel manner; * * *.

While the standared of proof of an aggravating circumstance necessary to authorize imposition of capital punishment is proof beyond a reasonable doubt, Art. 905.3, La.C.Cr.P., we submit that we could meet the "no evidene" standard with regard to the above aggravating circumstances.

The sole basis for the jury's determination that the aggravating circumstance pertaining to imprisonment after sentence for commission of an unrelated forcible felony was the prosecutor's argument pertaining to the escape from jail, immediately prior to the offense of murder, while the Petitioner was under a commitment order and sentence for the commission

of an unrelated forcible felony. "At the time of the commission of the offense," Defenant was no longer "imprisoned" since he had escaped from his place of confinement. The statute says, "was imprisoned," not "was supposed to have been imprisoned," after sentence for the commission of an unrelated forcible felony. The argument that Petitioner was imprisoned "at the time of the commission of the offense" was based upon some concept that flight after escape constituted continuing imprisonment since, but for the escape, he would have been imprisoned. That is analogous to the concept of asportation in a theft case, but an escape is complete once the prisoner has "departed" custody. L.S.A. RS 14:110.

There is no evidential support for the jury's finding of the aggravating circumstance prescribed by Art. 905.4(f), La.C.Cr.P.

The argued basis that the offense was committed in an "especially" heinous, atrocious, or cruel manner was the prosecutor's contention that the Petitioner, because of the path of the projectiles, had to have crawled into the victims' marital bed, gotten between them, and shot them one at a time so that the last person killed knew of the loss of the other and of their own impending doom. The binding and gagging of the victims was also contended to provide a basis for finding this aggravating circumstance.

The aggravating circumstance provided by Art. 905.4(g), La.C.Cr.P., qualifies the terms "heinous, atrocious, or cruel" with the modifier, "especially." Moreover, "heinous, atrocious or cruel" are descriptive of the "manner" of the infliction of death, not the psychological effects upon the victims pending their death. The focus should be on the "manner" of inflicting death, not on the natural psychological processes which would

result from the knowledge of what was going on. Stated another way, the "manner" of commiting the offense must have been "especially heinous, atrocious, or cruel," in order to qualify under Art. 905.4(g), La.C.Cr.P. An offense is not committed in an "especially heinous, atrocious, or cruel manner" in the absence of deliberate torture or the pitiless infliction of unnecessary pain on the victim." State v. Sonnier, 402 So.2d 650 (La. 1981); State v. Monroe, 397 So.2d 1258 (La. 1981); State v Culberth, 390 So.2d 847 (La. 1980). The "torture" to which reference is made in the jurisprudence "requires evidence of serious physical abuse of the victim before death." State v. Sonnier, supra.

In State v. Sonnier, 379 So.2d 1336 (La. 1979), the Louisiana Supreme Court originally concluded that the torture which would render *the manner of the killing "especially heinous, atrocious, or cruel"* could be either physical or psychological. On the appeal after remand of that case, however, the Court determined that the view that torture or the pitiless infliction of unnecessary pain as an aggravating circumstance in a capital penalty proceeding could be either physical or psychological was such a broad and vague addition to the construction of Art. 905.4(g), La.C.Cr.P., as to violate the Eight and Fourteenth Amendments to the United States Constitution. If the psychological torture or pitiless infliction of unnecessary pain on the victim were confined to the issue of the "manner" of killing the victim, rather than a mere concomitant condition resulting from the victim's situation, then, perhaps, the statute would not be considered to be extended. But any terror suffered by the victims in this case was merely "incidental" and not intentionally inflicted.

The manner of killing the victims in this case was a single contact gunshot wound to the head, resulting in instantaneous death. That type of wound is obviously inflicted to kill and not to maim or inflict pain. That type of wound and the "necessary" acts to inflict it, i.e., placing the pistol against the victim's head, does not render the manner of killing "especially heinous, atrocious, or cruel." State v. Culberth, supra. If it were necessary for the Petitioner to assume a position on the bed to assure that death would be instant and painless, e.g., to avoid from bad aim the more severe wounding by a misplaced shot, the principles of Culberth would seem equally applicable.

The binding and gagging of the victims did not constitute deliberate torture or the pitiless infliction of unnecessary pain on the victims. Whether or not it is believed that Petitioner was compelled to kill the victims in order to keep Wingo from killing him, it is clear the binding and gagging of the victims was necessary in order to avoid having to hurt them in the process of taking their car and valuables and to get away without risk of apprehension. When Petitioner called out Wingo's name and set in motion the decision to kill the victims, the victims were already bound and gagged. The binding and gagging was a mere condition which was present and had nothing to do with the "manner" in which the killing was performed.

There was thus no basis in fact for the jury to have found that the offenses were committed in an "especially" heinous, atrocious, or cruel manner.

In State v. Matthews, 407 So.2d 1150 (La. 1981), the Louisiana Supreme Court held that it is not necessary to overturn a death sentence when the jury finds more than one statutory aggravating circumstance and one or more of those circumstances are not supported, if one such circumstance is clearly supported by the evidence. We believe that misperceives the penalty-imposition scheme mandated by Art. 905.3, La.C.Cr.P.

Art. 905.3, La.C.Cr.P., provides:

> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances.

The finding of at least one statutory aggravating circumstance is essential to the due process analysis which must be applied in making the punishment fit the crime and the criminal. It is a factor authorizing capital punishment only in the sense that capital punishment cannot be imposed in the absence of such a finding. The statutory and jurisprudential role of the jury in the penalty determining process, however, is to *weigh* the aggravating circumstances against the mitigating circumstances and to determine, after proper evaluation of both sides of the equation, whether death is the appropriate penalty. The jury has a duty to consider the mitigating circumstances before reaching its binding "recommendation" to impose death penalties. State v. Watson, 423 So.2d. 1130 (La. 1983). When a factor is removed from the elements considered to have justified the imposition of capital punishment, there is no way in which it can be determined how the jury would have balanced all of the remaining competing factors.

In Zant v. Stephens, ___ U.S. ___, 103 S. Ct. 2733 (1983) this Court held that where Georgia law did not require the jury to weigh aggravating against mitigating circumstances in deciding upon the death penalty after finding at least one constitutionally valid and evidentially supported aggravating circumstance the constitutional infirmity of one of the aggravating circumstances relied upon by the jury would not invalidate the death penalty. In that case the invalid circumstance was vague although the defendant's record clearly fell within the legitimate thrust of the circumstance. Here, we are not dealing with the technical invalidity of one of the aggravating circumstances, but rather the total lack of evidence that the instant case fell within the fair meaning of the two aggravating circumstances in question. Moreover, the remaining two aggravating circumstances, being elements of first degree murder, remove this case from comparison with the "funnel" theory that murders are run through two screening tests before the death penalty can be found applicable.

Given these distinguishing factors, and adding the unique aspect that there is no way to tell whether the jury in the instant case pretermitted the powerful mitigating circumstance of coercion, it is extremely important that this Court consider Louisiana law and jurisprudence in this area and not find that this case is already governed by Zant v. Stephens, *supra*.

The jury found four aggravating circumstances in this case, two of which are totally unsupported by the evidence. There is no assurance that the jury would have considered that the remaining two aggravating circumstances were sufficient, when balanced against Petitioner's youth the evidence of compulsion and/or moral justification or extenuation of his

conduct, the lack of a significant prior history of criminal activity (the jury did not find the argued aggravating circumstance in Art. 905.4(c), La.C.Cr.P., that "the offender * * * has a significant prior history of criminalactivity), and his impairment due to intoxication, to warrant the death penalty.

The two remaining aggravating circumstances were also elements of the crime of first degree murder, viz., murder during the commission of an aggravated burglary and where more than one person's life was put at risk. In State v. Culberth, supra, 390 So.2d at 851, the Louisiana Supreme Court noted that "even though it can be said that murder, itself, is a heinous, atrocious, and cruel crime * * * it was not intended that all murders fall into that category." Likewise, for purposes of the infliction of the death penalty. It was not intended that all murders committed in the course of one of the enumerated felonies and/or all double murders should be necessarily punishable by death. If the statute had made provision that they would be necessarily punishable by death, it would have violated the principle of Roberts v. Louisiana, 431 U.S. 633 (1977). For this Court to automatically assume that the jury would have imposed a death sentence if it had not had unsupported aggravating circumstances under consideration in the balancing process mandated by Art. 905.3, La.C.Cr.P., runs afoul of the principles underlying Roberts.

This Court should certify to the Louisiana Supreme Court, as it did to the Georgia Court tha question what function do mitigating circumstances play after an aggravating circumstance has been found.

II.

WHERE A POLICE OFFICER TELLS A PRISONER WHILE ON AN AIRLINE FLIGHT THAT THE PRISONER MAY WRITE A LETTER TO HIS MOTHER AND FURNISHES THE PRISONER A PAD AND PEN AND, UPON COMPLETING THE LETTER, THE PRISONER ASKS THE OFFICER IF HE WANTS TO READ IT AND THE OFFICER RESPONDS THAT HE DOES NOT NEED TO READ THE LETTER WHEREUPON THE PRISONER FOLDS THE LETTER AND WRITES HIS MOTHER'S NAME ON THE OUTSIDE AND HANDS THE FOLDED PAPER TO THE OFFICER WHO ASSURES HIM IT WILL BE DELIVERED THE PRISONER HAS A REASONABLE EXPECTATION OF PRIVACY IN THE CONTENTS OF THE LETTER UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION SO THAT A LATER SEARCH AND SEIZURE OF THE CONTENTS OF THE LETTER WITHOUT A WARRANT OR ANY LEGITIMATE STATE INTEREST IN INSPECTING THE CONTENTS WAS UNREASONABLE AND THE DERIVATIVE USE OF A STATEMENT THEREIN WAS SO PREJUDICIAL REVERSAL IS REQUIRED.

On January 8, 1983, Detective Flowers and Deputy Haynes went to the San Diego County Jail where they met Petitioner and interrogated him. (Tr. 3/18/83, p. 46) Detective Flowers advised Petitioner of his rights as an arrestee, as enunciated in Miranda v. Arizona, 384 U.S. 436 (1966). (Id. pp. 46, 54) Glass executed a standard Louisiana State Police waiver form, which was admitted in evidence at the hearing on Petitioner's motion to suppress the letter to which this point of appeal relates. (Rr. S-1; id., p. 46) Each of the Petitioner's rights prescribed by the Miranda case were explained to Glass. (Tr. 3/18/83, p. 47) Glass understood the rights as they were explained to him. (Ibid.)

Detective Flowers gave the following testimony concerning the circumstances of the origination of the letter and its delivery to Deputy Haynes.

Glass was transported from San Diego to Shreveport via a commercial American Airlines flight on January 9, 1983. (Id., p. 48) Glass

was held in custody at the airport security office pending the boarding of the aircraft. (Ibid.) When it came time to board the aircraft, Glass was escorted to the airplane in handcuffs and leg irons. (Ibid.) Arrangements were made with the airline personnel for the officers and Glass to be seated aboard the aircraft before the other passengers. (Id., p. 57) They were seated in an area of the plane where there were three adjacent seats. Glass sat next to the window; Detective Flowers sat in the middle; Deputy Haynes sat next to the aisle. (Id., p. 49) Glass asked permission of the officers to write a letter to his mother while they awaited the departure of the flight. (Id., pp. 49, 97) Detective Flowers told Glass that he could write the letter after the airplane became airborne. Detective Flowers offered to furnish Glass the paper. (Id., p. 49, 57-58) After the airplane had been in flight for about thirty minutes, Detective Flowers got a pad from his briefcase and furnished it and a pen to Glass for the purpose of writing the letter. (Id., p. 50) Flowers told Glass: "You wanted to write a letter. You do it right now." (Ibid.) Glass then wrote the letter to his mother. (Ibid.)

After Glass completed the letter to his mother, he asked Detective Flowers if he wanted to read the letter. (Id.) pp. 50, 61) Flowers said, "No, that's all right." (Id., p. 50) Detective Flowers told Glass he did not "need to read it." (Id., p. 67) Glass then tore the letter from the pad, folded it and wrote his mother's name on the outside of it. (Id., pp. 50, 62) Glass then handed the letter to Detective Flowers, who then handed it to Deputy Haynes. (Id., pp. 50, 62) The letter was not in an envelope. (Id., pp.

50-51) The letter was given to Deputy Haynes because he promised to see that the letter would be delivered to Petitioner's mother. (Id., p. 62) Deputy Haynes told Glass, "If I can't carry it to her personally, I will get it to her." (Ibid.) Deputy Haynes put the folded letter into his inside coat pocket. (Id., p. 63) The letter was not mentioned again in Glass' presence. (Id., pp. 63-64) Before delivering the letter to Mrs. Glass, Deputy Haynes read it and made a photocopy of it and turned that over to the District Attorney. (Id., p. 51) The copy made by Deputy Haynes was marked for identification as Exhibit S-2 on the hearing of the motion to suppress. (Ibid.)

At the San Diego County Jail, and also while in flight, the officers told Glass that the State would seek the death penalty in his case. (Id., pp. 55-56) Detective Flowers told Glass "that I felt if he was convicted, that it was a good chance he would receive the death penalty." (Id., p. 56)

Deputy Haynes described the circumstances surrounding the letter and his seizure of its contents, as follows.

Deputy Haynes affirmed that Glass asked permission to write a letter to his mother and that Detective Flowers told him he would permit Glass to do so once the plane became airborne. (Id. p. 67) Detective Flowers furnished the paper. (Ibid.) Glass wrote the letter, then handed the folder with the letter still attached to the pad to Detective Flowers and asked if Flowers wanted to read it. (Ibid.) Deputy Haynes testified that Glass, rather than Flowers, handed him the letter and that it was then that the promise was made to see that Mrs. Glass got the letter. (Id., pp. 67, 72) But on further cross-examination, Deputy Haynes testified that Flowers

handed him the letter. (Id., p. 73) Haynes never told Glass he intended reading the letter. (Id., p. 74) Glass never gave Haynes permission to read the letter. (Id., p. 75) When Flowers agreed to allow Glass to write a letter and to furnish the paper for such purpose, Glass was not told that no envelopes were available. (Id., p. 71) Neither Haynes nor Flowers warned Glass that the letter could constitute evidence which could be used against him. (Id., p. 71) Deputy Haynes concluded that Glass should have understood that the letter might be so used because they had warned him, in accordance with Miranda, that what he said to them could be so used. (Id., p. 71) When Glass folded the letter, the writng was concealed within the folded paper. (Id., p. 73)

Deputy Haynes confirmed that Detective Flowers told Glass he could receive the death penalty. (Id., p. 69) Haynes admitted telling Glass he could receive the death penalty in response to a question asked by Glass at the conclusion of the initial interrogation at the San Diego County Jail. (Id., p. 69)

The Trial Judge denied Petitioner's motion to suppress the letter. (Id., p. 88)

At the trial of this cause, defense counsel renewed the objections raised by the motion to suppress and further urged that the letter was irrelevant and that it was prejudicial beyond any probative value. (R. 631-633) The Court held that the letter would be admissible. (R. 634)

Rather than introduce the letter during its case-in-chief, the State simply asked Mrs. Glass, a defense witness (R. 732):

> Q. * * * Mrs. Glass, did your son, following his arrest for these two crimes of first degree murder --now, this is after his arrest. . .

A. Okay.

Q. . . . did yor son make the following statement to you: "I know that I am going to die for what I have done"?

A. Yes. It was in a letter he wrote me.

Shortly after asking that question and receiving the response about the letter, the prosecutor stated (R. 752):

> I did not, for the record, ask her about a letter. But I mean, that's fine; I asked her about a statement.

Significantly, the "statement" was contained in the letter. When the prosecutor asked Mrs. Glass the question about the "statement," he was reading from the letter. Since the "statement" to which the State referred was one in the letter, we do not believe the State could legitimately avoid the consequences of using the letter as it did, rather than by introducing it in evidence. The answer given was a "derivative fruit" of the seizure of the contents of the letter by Deputy Haynes when he photocopied it. Since the State desired only that sentence to be read to the jury, it obtained its maximum prejudicial advantage by using the letter in precisely the manner it did.

In order to mitigate the damage done by the selective reading of a single sentence from the letter, defense counsel asked Mrs. Glass to read the entire letter to the jury. She did (R. 753):

> Mama,
>
> I hope this letter finds you doing well. As for me, I'm sure you know my situation. I really don't know what to say, but I guess there's not much I can say. I want you to know that I love you more than anyone or anything in this world. There is -- please do not grieve for me. I know that I'm going to die for what I have done. I'm not scared of dying, but I am scared of hurting you any more. I only hope and pray that in spite of what I have done you still love me. I

> want you to know that everything, even though I may die, we will always be together. My soul will be with you every step in your life, and when your life is over we will be together in God's kingdom. Pray for me, Mother, as I am doing. Ask God to see fit to save my soul. One day we will be together again. I don't know as of yet where they will be keeping me, but you can find out from O.H. Haynes. Please come see me, Mama. I need to know that you still care.
>
> Well, I must close for now. I will write as soon as possible. Take care. God Bless. And remember I love you always.

Glass had been incarcerated in the San Diego County Jail immediately prior to boarding the aircraft. It was the policy in that institution to censor prisoners' mail. He did not know what the policy of the officers was under the circumstances where he had obtained permission to write a letter to his mother. But when he asked permission to do so, the officers did not tell him it would be necessary or desirable to them to read the letter. When the Petitioner completed the letter, he asked Detective Flowers if he "wanted" to read the letter. Petitioner was not seeking to share with the officer the contents of his very personal letter to his mother. Instead, Petitioner's question should be construed, as Detective Flowers took it, to mean, "M[illegible] you censor this letter?" Detective Flowers testified that he told Glass he did not "want" to read the letter (Tr. 3/18/83, p. 50) and that he did not "need" to read it. (Id., p. 67) From those responses, it is clear that the reading of the letter was not a routine prisoners' mail censorship procedure. It was a response to the professional curiosity of the deputy sheriff, viz., an effort to see if the Petitioner incriminated himself in that letter.

The first case dealing with prisoners' mail to reach the United States Supreme Court on Fourth and Fifth Amendment grounds was Stroud v. United States, 251 U.S. 15 (1919). In that case, the Court did not find a violation of the prisoner's constitutional rights. The Court wrote:

> Certain letters were offered in evidence at the trial containing expressions tending to establish the guilt of the accused. These letters were written by him after the homicide and while he was an inmate of the penitentiary at Leavenworth. They were voluntarily written, and under the practice and discipline of the prison were turned over unlawfully to the warden, who furnished them to the district attorney. It appears that * * * application was made for a return of these letters upon the ground that their seizure and use brought them within principles laid down in Weeks v. United States, 232 U.S. 383 (1914), and kindred cases. But we are unable to discover any application of the principles laid down in those cases to the facts now before us. In this instance the letters were voluntarily written, no threat or coercion was used to obtain them, nor were they seized without process. They came into the possession of the officials of the penitentiary under established practice reasonably designed to promote the discipline of the institution. Under such circumstances there was neither testimony required of the accused, nor unreasonable search and seizure in violation of his constitutional rights. (Emphasis added)

As noted by the testimony of Detective Flowers of the Louisiana State Police, there was no censorship requirement, i.e., no "established practice reasonably designed to promote discipline" of the prisoner, which made necessary the censorship and seizure of the contents of the Petitioner's letter to his mother. Detective Flowers said he did not want to read the letter, nor did he "need" to do so. The present case is therefore distinguishable from the Stroud case. There was no institutional practice or prior warning to the Petitioner that his letter was subject to censorship and

the testimony clearly shows that there was no protective need to seize the contents of the letter through the process of censorship.

It is questionable whether Stroud is still good law. In 1919, prisoners were not regarded as having constitutional rights against censorship or seizure of correspondence, or any other rights, except, perhaps, against the infliction of cruel and unusual punishments. In Wolff v. McDonnell, 418 U.S. 539 (1974), it was recognized that the philosophy underlying Stroud is no longer the law. In Wolff, the Court said that "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime," and it has been held that a prisoner "is entitled to the Fourth Amendment's protection from unreasonable searches and seizures." United States v. Savage, 482 F.2d 1371 (9 Cir. 1973). Of course, the circumstances of the prisoner's condition--confined and deprived of his liberty by force of due process of law, obviously desirous of regaining his liberty, and forced to live in a hostile environment with other hostile prisoners--warrant a lesser standard of reasonableness when it comes to searches and seizures of prisoners. Moreover, the potential for transmitting escape plans or for receiving contraband into a prison make some censorship within a prison situation reasonable. Where there are established practices and procedures which would forewarn a prisoner that certain voluntary actions on his part, such as writing a letter, subject him to some deprivation of privacy, such as censorship of his letters, then the Stroud case would be more consistent with current constitutional principles. But in this case there was no established practice or procedure and a confessed lack of need which would have forewarned the Petitioner

or justified the intrusion into the private communication from Petitioner to his mother. Conceivably, if there had been, Petitioner would have been presented with the choice and might have elected either not to have written the letter or to have written it in a less incriminatory way.

Deputy Haynes concluded that, because the defendant had been warned that anything he told them could be used against him, Petitioner should have known that any private communique to his mother which found its way into their hands as a vehicle of delivery would likewise be subject to seizure and use against him. That is not a logical conclusion which a layman should be expected to make. In State v. Matthews, 217 Kan. 654, 538 P.2d 637 (1975), it was held that the prisoner had no reasonable expectation of privacy because he had been notified at the time of booking that prisoners' mail would be censored. In Rennert v. State, 263 Ind. 274, 329 N.E.2d 595 (1975), and State v. McCoy, 270 Or. 340, 527 P.2d 725 (1974), notice was printed on the stationery furnished to the prisoners and required to be used for correspondence.

The standard of reasonableness applicable to intrusions upon prisoners Fourth Amendment rights is a balancing formula, viz., "accomodation between institutional needs and objectives and the provisions of the Constitution." Wolff v. McDonnell, supra. In GIANNELLI & GILLIGAN, Prison Searches: "Locking" the Fourth Amendment Out of Correctional Facilities, 62 Va.L.Rev. 1045, 1092-1093 (1976), it was stated:

> Since free citizens are protected from unreasonable searches and seizures of their first-class domestic mail, inmates should enjoy the same protection unless the state can demonstrate governmental interests requiring attenuation of this right.

In Procunier v. Martinez, 416 U.S. 396 (1974), decided in the same term as Wolff, the Court had the occasion to address the issue of censorship of prisoners' mail. It held that censorship of prisoners' mail

> is justified if the following criteria are met. First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. * * * Second, the limitation of the First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.

The governmental interests involving the supervision and custody of prisoners are: "maintaining internal order and discipline, * * * securing (the) institutions against unauthorized access or escape, and * * * rehabilitating * * * the inmates placed in (official) custody." Procunier v. Martinez, supra.

The State did not claim any of those justifications for Deputy Haynes opening and reading Petitioner's letter to his mother. They had knowledge of the nature of the letter and the person to whom it was addressed. They knew that Petitioner had offered to allow Detective Flowers to read it. It obviously, then, would not have contained any escape plans. They had searched Petitioner at the jail and provided him the paper and pen with which to write the letter. The letter was written in their presence. It obviously contained no contraband. There simply were none of the usual justifications which would have supported censorship of Petitioner's letter which the officials gave Petitioner permission to write on his way back to jail in Louisiana.

The present case is very much like State v. Hinton, 266 S.C. 494, 224 S.E.2d 666 (1976), in which a jailer "routinely scanned outgoing mail"

therein proved to be highly intimate and personal and not of the sort he would want read by the police and he had been told they had no interest in reading it. It is apparent from the officer's action, *viz.* tucking the still folded paper into his coat pocket with the assurance that it would be delivered and not mentioning nor withdrawing it until he was no longer in Petitioner's presence, that Haynes could sense Petitioner's expectation of privacy. Also, it should not escape notice that Deputy Haynes waited until he was no longer in the presence of Detective Flowers to open, read and photocopy the letter. It was the latter who had told Petitioner that there was no need to read the letter.

The Court below held in the unpublished portion of its slip opinion at p. 9 (Appendix A):

> Defendant never intended to *mail* the letter
>
> . . . .
>
> Defendant asked Detective Flowers if the detective wanted to read the letter, which he merely folded over and gave to the officers for delivery to his mother. Under the circumstances, we have concluded that defendant had no expectation of privacy in the contents of the letter. Thus, he had no legitimate claim to Fourth Amendment protection and the trial judge was correct in refusing to grant defendant's motion to suppress. (emphasis added)

The Louisiana Supreme Court apparently finds the fact that the prisoner's letter was to be hand delivered and not mailed to be controlling. It could not have been the absence of an envelope since prisoners are generally not permitted to seal envelopes prior to censorship and posting unless to an attorney. The Fourth Amendment specifically refers to security in our *papers* not just our mail. While there may be a Federally protected interest in the privacy of our U.S. Mail beyond that spoken of here, there is no such analogous interest in privacy that attaches at the point a prisoner in an institution hands his unsealed envelope containing a folded letter to a guard *to be mailed* that a prisoner on an airplane who merely accepted the officer's offer to deliver the folded paper rather than wait until it could be mailed from the institution that was his destination should not be entitled to expect.

The other distinguishing factor the Court below relied upon was the simple wording of Petitioner's question "do you want to read it?" It is submitted that the only way to know how to fairly interperet these words would be if the officers had said yes. Petitioner might then have chosen to wait until he was in jail to send the letter. Since the officer's negative response not only answered the literal question whether he *wanted* to but further informed Petitioner that there was no need to our best test was denied us. To hold this against Petitioner and assume he was inviting his captors into his profoundly personal relationship with his mother is contrary to common sense.

This Court should balance the very probable likelihood that Petitioner did wish to exercise the minimal privacy protections afforded

prisoners under the Fourth Amendment with the utter illegitimacy of indicating it would not be read and then surreptitiously doing just that. That act was for law enforcement purposes, i.e., to gather information to use against Petitioner in the prosecution of the charges pending against him, not for anything having to do with the security of the Petitioner, the jail, or otherwise. The two criteria enunciated in the Procunier case for censoring prisoners' mail did not exist in this case. The intrusion into the folded letter was a search and the photocopying of its contents was a seizure. For law enforcement purposes, probable cause to believe the letter contained evidentiary data was required. No effort was made to have a "neutral and detached magistrate" review the information then in Deputy Haynes' knowledge and possession for probable cause to believe that the letter was anything more than what it was represented to be--a letter from a son in desparate trouble to his mother. We respectfully submit that this Honorable Court should follow Bletcher, supra, and State v. Sheriff, 619 P.2d. 181 (Mont. 1980) and hold that the search, photocopying and derivative use of the contents of Petitioner's letter to his mother violated Petitioner's rights under the Fourth and Fourteenth Amendments to the United States Constitution.

The seizure having violated Petitioner's constitutional rights, the constitutional harmless error rule of Chapman v. California, 386 U.S. 18 (1967), is applicable. We do not believe it can be legitimately determined that the admission of that letter was "harmless beyond a reasonable doubt." That letter was employed by the prosecutor to convey to the jury that even the Petitioner thought the death penalty was appropriate for his crime. In fact, the death penalty conclusion of the Petitioner had been implanted in his mind by the police. Petitioner did not even know that the

death penalty was again being considered a constitutional punishment in Louisiana. The statement was not a shorthand admission of all of the elements of first degree murder negativing the defense of lack of specific intent due to coercion, as it was presented to the jury by the prosecutor. It was a statement of resolution by a scared young man who had been told by the officers only hours before that he was going to 'Try". The distortion of the meaning of the Petitioner's statement is tantamount to the deliberate misrepresentations by the prosecutor in Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793 (1967). Such deceptive practices as make the finding of first degree and the "recommendation" of the death penalty more easy because the Petitioner appears to expect them, especially when that expectation reflects the opinion of the police and not an acknowledgement by the Petitioner, are very harmful and should constitute reversible error. This Court should offer guidance in this area regarding what level of privacy expectation triggers Fourth Amendment protection and analysis.

III.

THE DEATH PENALTY VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE FUTURE DECISIONS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT MAY APPLY TO PETITIONER'S CASE AND SUCH DECISIONS MAY BE GIVEN RETROACTIVE EFFECT ENTITLING PETITIONER TO A NEW TRIAL AND PETITIONER'S EXECUTION WILL PREVENT HIM FROM ENJOYING SUCH FUTURE RELIEF AS WOULD A PRISONER SERVING A LIFE SENTENCE. THE METHOD OF EXECUTION EMPLOYED BY LOUISIANA ALSO VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE ELECTROCUTION CAUSES THE GRATUITOUS INFLICTION OF UNNECESSARY PAIN AND SUFFERING AND DOES NOT COMPORT WITH EVOLVING STANDARDS OF HUMAN DIGNITY.

This argument relates to Petitioner's pre-trial challenge to the constitutionality of the imposition of the death penalty at all, as well as under the Louisiana statutory scheme because of the lack of adequate safeguards to prevent unequal application of the death penalty. That Specification also relates to the objection to the death-qualification process by which juries are selected (which has been argued elsewhere in the Argument on Specification of Error No. 7). Specification of Error No. 15 relates to the renewal of Petitioner's prior objections as well as his new objection that the manner of inflicting the death penalty, i.e. electrocution, is cruel and unusual in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

This court has probably now heard every argument conceived to date that the death penalty itself is cruel and unusual. The fact that the State may take a life as punishment for murder, but not lesser offenses, seems to be established in the decisions preceding this petition. E.g., Gregg v. Georgia, 420 U.S. 153 (1976); Coker v. Georgia, supra. We would adopt

by reference the myriad arguments previously advanced, as well as those which might develop during the pendency of this Petition, but we concentrate herein upon two arguments against the death penalty which we do not believe have been previously made and considered by this Honorable Court.

The death penalty, once inflicted, is permanent and irreversible. Due process of law, however, is a dynamic process which is responsive to the adversarial system of criminal justice, depending for its evolution upon litigation of certain issues as they arise in the course of such proceedings or occur to litigants involved in that process. What is found to be due today may turn out to be lacking in due process in the future. With the advent of the rule of retroactive application of certain constitutional rights, mainly those affecting the integrity of the fact finding process, there is no longer any certainty that a verdict obtained by today's process will meet the constitutional security of future jurists. The infliction of the death penalty results in society burying their mistakes of justice, i.e., persons convicted without due process of law. It is as much a failure of justice to convict a man without due process as it is to convict the wrong man. Once execution has occurred, due process may not be later accorded someone who was wrongly convicted. At the very least, since all Defendants undergo trial by the same rules of constitutional law, to take the life of a capital convict and thereby deprive him of future rights which evolve would appear to violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Two very fertile areas for future due process decisions in this case involve the use of gruesome photographs when the defense offered to

stipulate every relevant fact depicted or exhibited by those photographs and the death-qualification of juries sworn to try the issue of guilt when that process renders juries biased in favor of prosecution. Execution of a death sentence could very easily result in an irretrievable failure of due process if this Court is not impressed at this time with the force of the arguments made on Petitioner's behalf regarding those issues.

The second objection Petitioner argues on this Petition for Certiorari is that the method of execution, i.e., electrocution, is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Annexed hereto as an appendix is the affidavit of Russel F. Canan, Esq., an attorney who represented John Louis Evans and witnessed his electrocution at the Holman Prison Unit, Atmore, Alabama, on April 22, 1983. The observations of that witness are offered to acquaint the members of this Court, probably none of whom have ever or ever will experience such grotesque achievements of morbid cruelty.

Despite the repeated attention State and Federal Courts have given to capital punishment issues during the past decade, "this Court has never directly confronted the issue of the cruelty associated with various methods of imposing capital punishment." Gardner, Executions and Indignities --An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment, 39 Ohio St. L. J. 96, 97 (1978). It is clear, however, that the chief purpose of the Eighth Amendment was forbid certain types

of punishment from the colonial shores.[1] As the Eighth Amendment was intended to preempt the painful and gratuitous infliction of punishment upon captives in the United States, this Court should find that the method of capital punishment currently employed in Louisiana is cruel and unusual.

For over a century, courts have held the power to decide whether a particular method of capital punishment offends the Petitioner's constitutional rights. In Wilkerson v. Utah, 99 U.S. 130 (1878), the defendant was convicted of murder and sentenced to be shot. While the statute provided for the death penalty in first degree murder cases, it did not specify the method of execution. The Supreme Court upheld the trial court's sentence, ruling that the statute conveyed the implicit authority to specify the method. Importantly, the court recognized that certain types of punishment, such as disemboweling while alive, drawing and quartering, public dissecting and burning alive are prohibited by the Eighth Amendment and that courts can preclude such practices.[2]

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[1] "Expressions in the first Congress confirm the view that the cruel and unusual punishment clause was directed at prohibiting certain methods of punishment." Granucci, "Nor Cruel and Unusual Punishments Inflicted: The Original Meaning," 57 Cal. Rev. 839, 842 (1969). See, also, Furman v. Georgia, 408 U.S. 238, 377 (1972) (BURGER, C.J., dissenting).

[2] "Had the statute prescribed the mode of executing the sentence, it would have been the duty of the court to follow it, unless the punishment to be inflicted was cruel and unusual, within the meaning of the Eighth Amendment of the Constitution, . . ." 99 U.S. at 136-137

Twelve years later, the Court again addressed the scope of the Eighth Amendment's cruel and unusual clause. In re Kemmler, 136 U.S. 436 (1890). In that case, this Court held that the Eighth Amendment did not apply to the states yet it did comment upon what the clause was designed to promote:

> Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implied there something inhuman and barbarous, something more than the mere extinguishing of life. (136 U.S. at 447)

While electrocution was introduced into the United States before the turn of the twentieth century, this Court did not even indirectly address its use as a criminal sanction until Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947). The issue in that case was "whether the State of Louisiana could constitutionally execute the Petitioner, Willie Francis, after the electric chair had accidentally malfunctioned during a previous electrocution attempt." Gardner, op cit., supra, at 101. During the state's first attempt to kill Francis, the "electrocutioner turned on the switch and when he did Willie Francis' lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and the condemned man yelled: 'Take it off. Let me breathe.'" 329 U.S. at 480 n. 2.

By a 4 to 4 vote, this Court ruled that the State could again attempt to execute Francis. The plurality held that the Eighth Amendment sought to circumscribe "intentional" and "wanton" infliction of pain but not the "unintentional" or "accidental" infliction thereof. The dissent disagreed,

finding that a second attempt violated due process as it constituted torture culminating in death. While differing in result, the eight justices all agreed that the Eighth Amendment forbids unnecessary suffering induced by the State."[1]

Since Resweber, this Court has considered the question of what punishment is cruel and unusual in a number of different circumstances. Nearly all cases, however, turn on the examples given in Wilkerson, supra, or the proportionality theory of Weems v. United States, 217 U.S. 349 (1910). In the latter case, the Court reversed, on Eighth Amendment grounds, a sentence of fifteen years at hard labor, perpetual loss of various rights and civil liberties and a fine for the offense of falsifying a public record. The Court found the sentence comparatively harsh and for the first time defined cruelty in terms of evolving social mores. The Court held that the clause "cruel and unusual" should "acquire meaning as public opinion becomes enlightened by a human justice" and that "time works changes, brings into existence new conditions and purposes." 217 U.S. at 373, 378.

Later, the Court struck down the penalty of expatriation as cruel and unusual punishment for the crime of military desertion. Trop v. Dulles, 356 U.S. 86 (1958). The Court found that physical torture was not a necessary element of unconstitutional cruel punishment and that the psychological

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[1] "The issue in Resweber was not whether electrocution per se was compatible with the Eighth Amendment, but whether the aborted initial attempt rendered subsequent attempts to take Francis' life cruel and unusual. In Resweber, this Court assumed that successful electrocutions are not unconstitutionally cruel because they do not inflict unnecessary cruelty or pain; the Resweber Court, however, did not consider evidence of the actual pain suffered during death by electrocution." Gardner, op. cit. supra, 39 O. St. L.J. at 102.

pain inflicted on the expatriate was sufficient to render the punishment unconstitutional. The Court concluded that the essence of the Eighth Amendment was "nothing less than the dignity of man" and that its meaning must be drawn "from evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 100, 101.

The notion that the cruel and unusual clause must be interpreted by examining "evolving standards of decency" was reaffirmed by the Court when it chose to incorporate the clause into the Fourteenth Amendment Due Process clause. Robinson v. California, 370 U.S. 660 (1962). In Robinson, the Court struck down a California statute which criminalized drug addiction. These cases and their analysis of the clause requiring a court to determine whether punishment offended decency served as the primary buttress upon which the Court ruled that the unrestrained discretion to impose the death penalty itself was unconstitutional. Furman v. Georgia, 408 U.S. 238 (1972).[1]* As Mr. Justice Brennan wrote in his opinion (408 U.S. at 279):

> The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted . . . the punishment is unnecessary and therefore excessive.

In view of the descriptions of the process of electrocution set forth hereinbelow and in the annexed affidavit of Russell F. Canan, Esq., who observed the recent killing of John Louis Evans by the State of Alabama, it

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[1] * Other forms of cruel and unusual punishment have been found in non-capital settings. E.g., Landman v. Royster, 333 F. Supp. 621 (E.D.Va. 1971) (shackling); Jackson v. Bishop, 404 F.2d 571 (8 Cir. 1968) (flogging). Both were found to be too severe a sanction, hence cruel and unusual.

is hard to imagine a more painful death than by electrocution. Lethal injection is "significantly less severe" and equally "adequate to achieve the purpose for which the punishment is inflicted." Louisiana's election to utilize the more severe form of execution is thus constitutionally suspect. The choice of electrocution over a more humane form of eradication of human life "is nothing more than the pointless infliction of (needless) suffering." Ibid.

With Gregg v. Georgia, supra, this Court held that the Eighth Amendment did not bar capital punishment under all circumstances and went on to approve several sentencing schemes which channeled the discretion of the sentencer.[1]* These cases neither endorsed a particular mode of punishment nor suggested that the requirement that prisoners be treated with dignity and not subjected to unnecessary suffering be relaxed.

From the foregoing cases, it is clear that any form of capital punishment which gratuitously subjects a person to unnecessary suffering prior to death runs afoul of the constitutional norm. An examination of the effect that electrocution has on a prisoner prior to the inducement of death shows that this form of capital punishment involves a great deal of pre-death pain and torture and can grotesquely disfigure the body.

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[1] * For reasons stated elsewhere in this petition, we do not believe the discretion of the sentencer is properly channeled under the Louisiana scheme where the jury is not required to apply a balancing test, assessing the weight of the aggravating circumstances and the weight of the mitigating circumstances and imposing the death sentence only when the aggravating circumstances outweigh the mitigating circumstances, if the Louisiana Supreme Court, as it said it could in State v. Matthews, 407 So.2d 1150 (La. 1981), can disregard that balancing process and, upon the weight of a single supportable aggravating circumstance--no matter how many the jury found which this Court finds to be unsupportable by the evidence--can justify the imposition of the death penalty which, alone, the jury might not have found sufficient to outweigh the mitigating circumstances.

Even at the advent of electrocution, experts characterized electrocution as a form of torture because the victim may be alive for several minutes after the current has passed through the body. In his work on capital punishment, Teeters reported the following physiological description of how electrocution works to produce death:

> The current flows along a restricted path into the body and destroys all the tissue confronted in this path. In the meantime, the vital organs may be preserved; and pain, too great for us to imagine, is induced. The brain has four parts. The current may touch only one of these parts, so that the individual retains consciousness and a keen sense of agony. For the sufferer, time stands still; and this excruciating torture seems to last for an eternity.

N. Teeters, Hang by the Neck 447 (1967).

Gardner has documented the step by step process which culminates with electrocution as providing numerous affronts to basic human dignity:

> Apart from the issue of physical pain, electrocution, like hanging, requires preliminaries that sharpen the prisoner's apprehension of his fate and increases his psychological suffering. Early in the morning of execution day, the top of the condemned person's head and the calf of one leg are shaved to afford direct contact with electrodes. The prisoner then waits, sometimes for hours, until he is taken to the electrocution chambers, strapped into the chair, and connected to the electrodes at his head and legs. Various indignities attend electrocutions. Sometimes the victim's eyeballs fall from their sockets. He urinates and defecates, and his tongue swells. The body may catch on fire, and the smell of burning flesh usually permeates the chamber. Electrocution is an extremely violent means of inflicting death. At the moment the switch is thrown all the muscles of the body contract; the result is severe contortions of the limbs, fingers, toes, and face. The body turns bright red as its temperature rises. Witnesses to electrocutions often become emotionally upset by the gruesome aspects of this method of death.

Gardner, op. cit. supra, at 126. If it can be urged that the foregoing is mere speculation, we submit that the affidavit of Russell F. Canan, Esq., annexed hereto, corroborates the depiction of the manner of death and the horrible suffering and destruction of the body described by Gardner, supra.

Accordingly, Petitioner submits that electrocution offends the Eighth Amendment to the United States Constitution because it inflicts a significant degree of gratuitous physical and psychological pain and offends basic human dignity because of its violence and the way it disfigures. The death penalty inflicted by this means is literally "cruel and unusual punishment" which the Eighth Amendment sought to ban. Electrocution, with the availability of the more humane method of lethal injection, is an antiquated form of torture which does not comport with the "evolving standards of decency that mark the progress of a maturing society." Trop, supra, at 101. Only the avid devotee of torture could prefer electrocution as a means of execution.

CONCLUSION

For the reasons shown, a writ of certiorari should issue to review the judgment and opinion of the Louisiana Supreme Court.

Respectfully submitted,

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EXHIBIT (A)

AFFIDAVIT OF RUSSELL F. CANAN

My name is Russell F. Canan. I am a member of the bar of the District of Columbia. I have been engaged in the practice of law since 1976.

I am presently employed at the Southern Prisoners' Defense Committee as a staff attorney. I represented John Louis Evans and was a witness to his execution at the Holman Prison Unit, Atmore, Alabama on April 22, 1983. The witness room is adjacent to the execution chamber; a glass partition separates the rooms. I was 15 feet away from the electric chair when Mr. Evans was executed.

The State of Alabama uses electrocution as the method of execution. Prison officials had previously announced that the electric chair, which had not been used in 18 years, had been tested daily in the ten days prior to the execution date. It was announced that one thirty second jolt of 1900 volts of electricity would be sufficient to execute Mr. Evans.

At 8:30 p.m. the first jolt of 1900 volts of electricity passed through Mr. Evans' body. It lasted thirty seconds. Sparks and flames erupted from the electrode tied to Mr. Evans' left leg. His body slammed against the straps holding him in the electric chair and his fist clenched permanently. The electrode apparently burst from the strap holding it in place. A large puff of greyish smoke and sparks poured out from under the hood that covered Mr. Evans' face. An overpowering stench of burnt flesh and clothing began pervading the witness room. Two doctors examined Mr. Evans and declared that he was not dead.

The electrode on the left leg was refastened. At 8:30 p.m. Mr. Evans was administered a second thirty second jolt of electricity. The stench of burning flesh was nauseating. More smoke emanated from his leg and head. Again, the doctors examined Mr. Evans. The doctors reported that his heart was still beating, and that he was still alive.

At that time, I asked the prison commissioner, who was communicating on an open telephone line to Governor George Wallace to grant clemency on the grounds that Mr. Evans was being subjected to cruel and unusual punishment. The request for clemency was denied.

At 8:40 p.m., a third charge of electricity, thirty seconds in duration, was passed through Mr. Evans' body. At 8:44, the doctors pronounced him dead. The execution of John Evans took fourteen minutes.

Russell F. Canan

Russell F. Canan

Sworn to this 22d. day of June, 1983

Notary Public

My Commission expires:

Notary Public, Georgia, State at Large
My Commission Expires May 3 1986

APPENDIX "A"

Please note that Appendix "A" consisting of the required number of copies of the slip opinion of the court below, including the highly relevant unpublished portion thereof, as well as the per curiam denial of the Petition for Rehearing, was submitted to this Honorable Court with Petitioner's motion for extention of time to file Petition for Certiorari.

APPENDIX "B"

Louisiana Statutes Annotated R.S. 14:30 provides:

> First degree murder is the killing of a human being:
>
> (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;
>
> (2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;
>
> (3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or
>
> (4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.
>
> For the purposes of Paragraph (2) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney, or district attorney's investigator.
>
> Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury.

Louisiana Code of Criminal Procedure Articles 905 et. seq. provides:

> Art. 905

Following a verdict of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing as provided herein.

Art. 905.1

A. Except as provided in Part B herein, the sentencing hearing shall be conducted before te same jury that determined the issue of guilt. The order of sequestration shall remain in effect until the completion of the sentencing hearing.

B. If an error occurs only during the sentencing hearing which would necessitate the declaration of a mistrial, or the granting of a new trial by the trial court, or if an appellate court finds an error that occurred only in the sentencing hering which would necessitate a remand and a new trial, then the trial court shall be empowered to empanel a new jury under the same procedure set out in Title XXVI, Chapter 3 of The Louisiana Code of Criminal Procedure for determining only the issue of penalty, and the rule of sequestration shall apply to the new jury so empanelled.

Art. 905.2

The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. the jury may considr any evidence offered at the trail on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissable except for purposes of impeachment.

Art. 905.3

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances.

Art. 905.4

The following shall be considered aggravating circumstances:

(a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;

(b) the victim was a fireman or peace officer engaged in his lawful duties;

(c) the offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping or has a significant prior history of criminal activity;

(d) the offender knowingly created a risk of death or great bodily harm to more than one person;

(e) the offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) the offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) the offense was committed in an especially heinous, atrocious, or cruel manner; or

(h) the victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigtion or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(i) the victim was a correctional officer or any employee of the Louisiana Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in hi lawful duties at the time of the offense.

For the purposes of Subparagraph (b) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, atorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

Art. 905.5

The following shall be considered mitigating circumstances:

(a) The offender has no significant prior history of criminal activity;

(b) The offense was commited while te offender was under the influence of extreme mental or emotional disturbance;

(c) The offense was committed while the offender was under the influence or under the domination of another person;

(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(e) At the time of the offense the capacty of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(f) The youth of the offender at the time of the offense;

(g) The offender was a principal whose participation was relatively minor;

(h) Any other relevant mitigating circumstance.

Art. 905.6

A sentence of death shall be imposed only upon the unanimous recommendation of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Art. 905.7

The form of jury recommendation shall be as follows:

"Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

s/_____

Foreman"

or

"The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

s/_____

Foreman"

Art. 905.8

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Art. 905.9

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

Louisiana Statute Annotated R.S. 15:569 provides:

Every sentence of death imposed in this state shall be by electrocution; that is, causing to pass through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person convicted until such person is dead. Every sentence of death imposed in this state shall be executed at the Louisiana State Penitentiary at Angola. Every execution shall be made in a room entirely cut off from view of all except those permitted by law to be in said room.

APPENDIX

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

84-6030 (3)

APPENDIX "A"

51 pp

MAY 14 1984

SUPREME COURT OF LOUISIANA

No. 83-KA-1735

STATE OF LOUISIANA

Versus

JIMMY L. GLASS

Appeal from the Fifteenth Judicial District Court,
Parish of Lafayette,
Honorable Ronald D. Cox, Judge.

CALOGERO, Justice

Defendant, Jimmy Glass, was indicted by a Webster Parish Grand Jury on two counts of first degree murder. Because of pretrial publicity, venue was changed from the Twenty-Sixth Judicial District to the Fifteenth Judicial District in Lafayette. Glass was found guilty as charged and the jury recommended the death penalty.[1] In this appeal defendant argues fifteen assignments of error.

In this opinion we will treat the four assignments of error (assignments 5, 10-11, and 9), which are potentially the most serious, and review the sentence. The remaining assignments involve legal issues governed by clearly

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[1]Glass' companion, Jimmy Wingo, was also indicted on two counts of first degree murder. After Glass' motion to sever was granted, Wingo was also tried, found guilty of first degree murder and sentenced to death. His case is presently pending in this Court on appeal, No. 84-KA-0260.

established principles of law. They will be treated in an appendix which will not be published, but which will comprise part of the record in this case.

Because we find none of defendant's assignments of error meritorious, defendant's conviction and death sentence will be affirmed.

FACTS

The facts as adduced at trial are as follows.

Defendant Glass, who was in prison following his conviction and sentence for armed robbery, and one Jimmy Wingo, who was awaiting trial on two counts of burglary, escaped from the Webster Parish Jail in Minden, Louisiana, on Christmas Eve, December 24, 1982. Around eight o'clock that evening, the two men were being allowed to make telephone calls to their families. When the deputy had to leave them unattended momentarily, because of a disturbance in the cells, they descended in the elevator and escaped.

What happened at the crime scene comes largely from the trial testimony of the defendant. According to Glass the escape was Wingo's idea. Once outside, the two men made their way from Minden to Dixie Inn, Louisiana, for the most part walking through fields. Defendant testified that they came out on a road and found some kind of business and a house (with no one evidently at home). As they tried to enter a window at the back of the house, a car turned into the driveway. According to Glass' testimony the duo watched Mr. and Mrs. Brown get out of the car and go into the house. Since the keys were not left in the parked car, Wingo decided to check out the storeroom located in the carport area. He found a refrigerator containing beer.[2] They retreated beyond the hedge and drank beer. According to Glass' testimony Wingo decided that they should wait until the couple went to sleep.

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[2]According to defendant, Wingo also found gloves in the storeroom which he wore from that time on.

smash the patio door, then go in, surprise the couple, and tie them up. During the planning and drinking, Glass also consumed some champagne.

The defendant testified that, pursuant to Wingo's instructions, he cut the telephone wires with a pair of hedge clippers and threw a piece of petrified wood through the glass of the patio door. Glass and Wingo then opened the door, entered the house and ran down the hall to the bedroom where they found Mrs. Brown standing on the side of the bed screaming and Mr. Brown lying in the bed. Mr. and Mrs. Brown were told to lie face down on the bed. By that time Wingo had acquired a shotgun and rifle. Defendant Glass rooted through the man's billfold and through various furniture drawers, etc. In the nightstand drawer Glass found .38 caliber shells. He asked Mr. Brown where the pistol was kept and was told that it was in the closet. He went to the closet where he found the gun. While searching for the gun Glass cut his thumb on a saw that was on the closet shelf.[3] Mrs. Brown told defendant Glass the location of her purse which he then emptied in the living room. As defendant looked through other rooms for possible loot, he called out Wingo's name and asked him what to do next. Wingo told Glass to shut up. After taking liquor from the kitchen cabinet and putting it in the back seat of the Browns' car, defendant was allegedly told by Wingo that he, Glass, had to kill the couple, who had been bound and gagged, since Glass had called out Wingo's name when they were in the house.

Defendant testified that Wingo poked him in the back of the head with the shotgun barrel and told him that he was to kill them, or Wingo would "splatter [his] brains all across this room."[4] Glass testified that Wingo kept the

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[3]Defendant's fingerprints were found on the saw.

[4]There is only defendant's testimony to the effect that he was forced to kill the two victims.

shotgun at defendant's neck or back as Glass made his way back to the bedroom. Then Glass allegedly put his knee on the foot of the bed, more on the man's side, bent over, closed his eyes and pulled the trigger.[5] As the woman raised her head and started to scream, defendant allegedly pointed the gun, closed his eyes, and pulled the trigger.[6] Glass testified that, before leaving the room, he pulled the covers up over the victim's heads.

Wingo and Glass then took the Browns' car[7] toward Vivian, Louisiana, so that Wingo could see his girlfriend. In Vivian, the two men were forced to abandon the car which had broken down after hitting high water which had flooded the road. The pair walked to the house of Wingo's sister and picked up Gwen Hill, Wingo's girlfriend, and spent a day in the woods. Glass testified that the three then took a truck and drove to Atlanta, Texas, where Wingo and Gwen stayed in a motel room, while defendant took the truck and went on to Little Rock, Arkansas, and eventually to a friend's house. In the meantime, state troopers began looking for Glass. He then allegedly took a bus to Ventura Beach, California. From there he went to San Diego where he was eventually picked up.

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[5]Dr. George McCormick, the pathologist, testified that both victims died as a result of a laceration of the brain due to a single gunshot wound. The bullet entered Mr. Brown's head on the right side of the back of the head and exited on the left side of the forehead. The bullet entered Mrs. Brown's body and exited above the right eyebrow. Both were contact wounds, according to the pathologist.

[6]The pathologist testified in rebuttal that it would have been impossible for defendant to be so positioned when he shot the couple. The doctor had originally testified that the killer had most probably been positioned in the bed between the two victims.

[7]Defendant Glass' fingerprints were found on the Browns' Lincoln Continental when it was recovered.

ASSIGNMENT OF ERROR NO. 5

Defendant Glass contends that the trial judge erred when he refused to appoint another psychiatrist to examine defendant after one of two psychiatrists who had been appointed failed to examine defendant with respect to his sanity at the time of the offense.

Prior to trial defendant was allowed to change his "not guilty" plea to a plea of "not guilty and not guilty by reason of insanity." At the time defendant requested that he be allowed to withdraw his original plea, he also requested a continuance of the trial date. Defendant, an indigent, requested this continuance hoping that he would be able to obtain a psychiatric examination by physicians of his own choice at the expense of the Indigent Defender Board. The trial court refused to grant a continuance but gave defendant the opportunity to request the appointment of a Sanity Commission. Defendant took advantage of the opportunity. The court appointed Dr. Robert L. Turner and Dr. James H. Blackburn to examine defendant in order to assess his mental condition at the time of the offense.

Dr. Blackburn examined defendant and submitted a psychiatric evaluation in which he found that defendant was not suffering from any mental illness or emotional disorder which would have affected him severely at the time of the offense. He recited also that defendant was able to assist in his own defense. Defendant did not object to the sufficiency of Dr. Blackburn's report.

Defendant did object to the one sentence report of Dr. Turner which read: "I have examined Jimmy Glass and find him to be competent, capable of understanding the charges against him with an understanding of the difference between 'right' and 'wrong', and capable of assisting counsel in his defense."

In objecting to Dr. Turner's report defendant argued that it did not discuss the issue of sanity at the time of the offense. In response to his objection, the trial judge allowed defendant to subpoena Dr. Turner in order to cross-examine him, out of the presence of the jury, with respect to defendant's sanity at the time of the offense.

At the hearing Dr. Turner elaborated on his brief written report. Dr. Turner testified that he conducted a psychiatric interview with defendant in which he questioned defendant about such things as his thought content, intellectual functioning, past history, sensorium, mood, and his state of mind at the time of the offense. It was Dr. Turner's opinion that defendant has an antisocial personality disorder. However, he was of the view that defendant was not suffering from any type of mental disease or defect which would have prevented him from knowing the difference between right and wrong.

A fair reading of the testimony of Dr. Turner, coupled with his brief report, including its reference to defendant's knowing the difference between right and wrong, the appropriate test for time of offense insanity under La. R.S. 14:14, leads us to conclude that the doctor did examine for and testify to defendant's sanity at the time of the offense. Under these circumstances, it was not error for the trial judge to refuse to appoint another doctor.[8]

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[8]Having changed his plea to not guilty and not guilty by reason of insanity, and having had psychiatric evaluations performed by two doctors, defense counsel was at liberty to call the doctors to the stand, in the presence of the jury, and have them testify about defendant's sanity at the time of the offense. Defendant chose not to have the doctors testify. It seems apparent to us that sanity at the time of the offense was never really at issue in the case and defendant did not seriously urge the defense. Nonetheless, the case went to the jury with the issue of insanity before it. The jury determined that the sanity defense did not prevail and defendant was guilty as charged.

Having determined that the sanity commission appointed by the trial court fulfilled its duties, we find that this assignment of error is without merit.

ASSIGNMENTS OF ERROR NOS. 10 AND 11

With these assignments of error defendant contends that the trial court erred when it charged the jury that the defense of coercion is not available to one charged with the murder of an innocent person. Defendant also argues that the trial judge erred when it refused to charge the jury, in accordance with defendant's requested special jury charges nos. 7 and 9, that the jury "must analyze defendant's personal intent based upon the 'mental element proved at trial' and 'may not attribute to him any such specific intent which may have existed on the part of another person.'"[9]

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[9]The special instructions requested by defendant read as follows:

DEFENDANT'S REQUESTED SPECIAL JURY CHARGE NO. 7

You are instructed that:

> One who aids and abets in the commission of a crime may be charged and convicted with a higher or lower degree of the crime, depending upon the mental element proved at trial. STATE V. McALLISTER, 366 So.2d 1340 (La. 1978).

DEFENDANT'S REQUESTED SPECIAL JURY CHARGE No. 9

You are instructed that:

> In order to convict this defendant of first degree murder, you must find beyond a reasonable doubt that he personally desired the deaths of Newton Brown and Erlene Brown, or that great bodily harm occur to Newton Brown and Erlene Brown. If you do not find beyond a reasonable doubt that this defendant had such specific intent you must acquit him of first degree murder, and you may not attribute to him any such specific intent which may have existed on the part of another person.

The trial judge's instruction to the jury, that the defense of coercion is not available to one charged with the murder of an innocent person,[10] was based upon La. R.S. 14:18 which provides in part:

> The fact that an offender's conduct is justifiable, although otherwise criminal, shall constitute a defense to any crime based on that conduct. This defense of justification can be claimed under the following circumstances:
>
> (6) When any crime, except murder, is committed through the compulsion of threats by another of death or great bodily harm, and the offender reasonably believes the person making the threat is present and would immediately carry out the threats if the crime was not committed.. (emphasis provided)

Defendant takes the position that he was compelled to kill the victims when Wingo held the gun to his head and ordered him to kill the couple. In brief defendant argues that "while it may not be an affirmative defense which excuses otherwise criminal conduct, coercion has a defensive role in determining the degree of the offense and the culpability of the offender in a murder case." Defendant contends in brief that "the killing of a human being while under the compulsion of an imminent and imperative threat of death...negates the requirement of proof of specific intent in a prosecution for first degree murder."

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[10]The disputed charge given by the trial judge read as follows:

SPECIAL CHARGE

> The defendant's conduct in a murder case is not justified when the offense charged was committed through the compulsion of threats by another of death or great bodily harm and the defendant reasonably believed the person making the threat would carry out the threat. The defense of coercion is not available to one charged with murder of an innocent person.. (emphasis in original)

We find that this assertion by defendant does not comport with the law. While coercion, or threats by Glass' accomplice (which we will accept as true for purpose of this argument), may in large part have affected Glass' motivation, i.e., to save his own life, this factor has no bearing on whether defendant had specific intent as required by the first degree murder statute.[11]

Under the facts of this case the jury might properly conclude that by shooting both victims with the barrel of the pistol in contact with their heads defendant had the specific intent to kill them. It is apparent that he "actively desired" to end their lives, regardless of the fact that his principal motivation may have been to save his own life.

The pertinent concern is not whether coercion eliminates the requirement for proof of specific intent, but whether coercion, under these circumstances should, by law, be seen as justifiable, and constitute a defense. The legislature

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[11]La. R.S. 14:30, which defines first degree murder, includes as an essential element "specific intent to kill or to inflict great bodily harm..."

Specific intent is defined by La. R.S. 14:10(1):

> Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act.

has provided a negative response by its enactment of La. R.S. 14:18(6), supra.[12]

The trial judge's instruction to the effect that the defense of coercion is not available to one charged with

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[12]At common law it was generally said that duress does not justify the killing of an innocent person even if the offender acted under imminent threats. State v. Toscano, 74 N.J. 421, 378 A.2d 755 (N.J. 1977), citing Arp. v. State, 97 Ala. 5, 12 So. 301 (1893); Brewer v. State, 72 Ark. 145, 78 S.W. 773 (1904); State v. Nargashian, 26 R.I. 299, 58 A. 953 (1904); People v. Martin, 13 Cal. App. 96, 108 P. 1034 (1910); Taylor v. State, 158 Miss. 505, 130 So. 502 (1930).

The Model Penal Code draftsmen have noted that most of the states which have enacted statutes concerning the defense of duress do not recognize the defense with respect to the most serious crimes. Model Penal Code, §2.09, Comment 1, at 2 (Tent. Draft No. 10, 1960). However, the draftsmen of the Model Penal Code thought that homicide might sometimes be the "product of coercion that is truly irresistible" and thus did not make murder an exception in their proposed section on duress. Id. Comment 2, at 8. Model Penal Code §2.09, concerning duress as a defense provides in part:

> (1) It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.
>
> (2) The defense provided by this Section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

A few states, while not allowing duress as a complete defense to murder, do permit it to mitigate the killing to manslaughter if the accused was coerced by someone other than his co-conspirator. e.g., Minn. Stat. Ann. §609.20; Wis. State. Ann. §939.46.

murder is a correct statement of the law. La. R.S. 14:18 (6); State v. Capeci, 154 So. 419 (La. 1934).[11]

We find that the trial court was also correct in refusing to charge the jury in accordance with defendant's requested special charges nos. 7 and 9. See n.3 supra.

A defendant has the right to submit special written charges to the jury. The trial judge must give a requested charge which does not require qualification, limitation or explanation and which is not included in the general charge or another special charge, if it is correct and pertinent to the case. La. C.Cr.P. art. 807; State v. Shilling, 449 So.2d 119 (La. 1983); State v. Jones, 431 So.2d 99 (La. 1983); State v. Lovett, 359 So.2d 163 (La. 1978).

Defendant's requested charge which stated that defendant had to have "personally desired the deaths" of the two victims was substantially covered in the trial court's general charge on first-degree murder. In that charge the court stated that specific intent was required and then defined specific intent as the "state of mind which exists when the circumstances indicate that the defendant actively desired the prescribed criminal consequences to follow his act...." (emphasis in original). Since the requested charge was substantially included in the court's general charge it was properly refused. See State v. Holmes, 388 So.2d 722, 725 (La. 1980).

Defendant's requested charge no. 7 pertaining to one who aids or abets in the commission of a crime, was not pertinent under the facts of this case as related by defendant. Defendant did not simply "aid and abet," rather, he

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[11]Note, however, in our discussion under Assignment of Error No. 9, infra, that the trial judge was willing to consider allowing this argument during the sentencing phase of the trial.

was the actual perpetrator of the murders. Thus, this charge was properly refused.

Assignments of Error nos. 10 and 11 are without merit.

ASSIGNMENT OF ERROR NO. 9

With this assignment of error defendant contends that the trial court erred when it refused to permit defendant to exhibit Jimmy Wingo, without compelling him to testify, so that the jury could assess the reasonableness of defendant's fear that Wingo would kill him if defendant did not kill the victims. Specifically, defendant contends that this ruling resulted in a denial of his right to compulsory process of favorable evidence.

During the course of trial the defense requested that it be allowed to call Jimmy Wingo into the courtroom and have him exhibited before the jury as physical evidence. Defense counsel informed the court that the purpose of using Wingo as physical evidence was to corroborate defendant's anticipated testimony concerning the fact that defendant was afraid of Wingo. Thus, exhibiting Wingo before the jury presumably would have supported defendant's argument concerning coercion.

The state did not object to defendant's request to exhibit Wingo as physical evidence. However, at the time this request was made Wingo, against whom murder charges were then pending, had his defense attorneys present in the courtroom. Wingo's lawyers asserted their objection to any viewing or presentation of Wingo. Their objection was based on the belief that exhibiting Wingo during defendant's trial, and the attendant publicity, would ultimately prejudice Wingo's right to a fair trial. The attorneys also expressed their belief that bringing Wingo into the courtroom might cause venue problems in his own case.

The trial court refused to grant defendant's request and cited as authority State v. Berry, 324 So.2d 822 (La. 1975). Defense counsel then requested a subpoena duces tecum to produce mug shots of Wingo for the purpose of showing the jury what Wingo looked like. The trial court refused this request, again citing State v. Berry, supra, and stating that the defense was trying to make an impression on the jury which would prejudice the jury members.

The trial judge then suggested that Wingo could be weighed and measured and that there might be a stipulation as to this information. In the alternative he suggested that witnesses, or the defendant himself, could testify to Wingo's size.

On appeal defendant correctly contends that State v. Berry, supra, cited by the trial court as authority, is not determinative of the present issue.[14] Nonetheless, we note that the trial judge later elaborated on his refusal to allow defendant to display Wingo as physical evidence. The trial judge correctly understood that the purpose of exhibiting Wingo was to support defendant's coercion argument: namely, that defendant was physically afraid of Wingo and was compelled to kill the victims because of that fear. The court concluded that since coercion is not a defense to murder (see discussion under Assignments of Error nos. 10 and 11), such evidence was

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[14] Berry involved defendants calling a witness to the stand in order to invoke his Fifth Amendment privilege in the presence of the jury. In Berry, the state had the jury removed before the witness took the stand. The witness then took the stand and invoked his privilege. Defense counsel objected to the exclusion of the jury. This Court stated that it was "improper conduct for either the prosecution or the defense knowingly to call a witness who will claim a privilege for the purpose of impressing upon the jury the fact of the claim of privilege." 324 So.2d at 830. That was not the situation in the instant case. Defendant only sought to use Wingo's body as an exhibit.

not relevant in the guilt phase of the first degree murder trial. The court did suggest that using Wingo as an exhibit to support defendant's coercion argument might be relevant during the sentencing phase in order to prove a mitigating circumstance. Apparently, the judge was referring to La. C.Cr.P. art. 905.5, which provides, as a mitigating circumstance in capital sentencing, that "[t]he offense was committed while the offender was under the influence or under the domination of another person."

Interestingly, during the sentencing phase of the trial defense counsel did not seek to have Wingo shown to the jury as evidence of a possible mitigating circumstance, or for any other reason.

Defendant did testify that he was forced to kill the victims, and during closing arguments defense counsel did mention that one of the mitigating circumstances is the fact that the offense was committed while the offender was under the influence or domination of another person. In addition, the trial judge included that mitigating circumstance in his instructions to the jury. It is of course likely that the jury did not believe defendant's testimony that Wingo forced him to shoot the victims.

Defendant's claim of coercion, if believed, would not have justified the two murders. La. R.S. 14:18(6). Nor would his argument have affected the determination of whether defendant had the requisite specific intent. Accordingly, we find that the trial court did not err in its refusal to grant defendant's requests to exhibit Wingo and show his mug shots to the jury.

This assignment of error is without merit.

SENTENCE REVIEW

On April 8, 1983, the jury found defendant, Jimmy Glass, guilty of the first degree murders of Newton and Erline Brown. Following the sentencing phase, on April 9, 1983, a unanimous jury recommended that defendant be sentenced to death. La. C.Cr.P. art. 905.1. Pursuant to the jury recommendation, on April 29, 1983, the trial court sentenced defendant to death. La. C.Cr.P. art. 905.9.

La. C.Cr.P. art. 905.9.1 mandates that this Court review every sentence of death for excessiveness. In particular, this Court must consider: (a) whether the sentence was imposed under the influence of passion, prejudice, or other arbitrary factors; (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance; and (c) whether the sentence is disproportionate to the sentences imposed in similar cases considering both the crime and the defendant.

The Capital Sentence Investigation Report reveals that defendant, a white male, was nineteen years old at the time of the crime. He is divorced from his wife and has one child, a daughter, approximately one and one half years old. He has no other dependents and at the time of the offense he was not contributing to the support of his child. He was the first of four children born of a legitimate union. His father was an alcoholic and epileptic who did not provide for the family. Defendant dropped out of high school two weeks prior to finishing twelfth grade. He was failing at least one course needed for graduation. Defendant admits to the use of alcohol and marijuana since the age of thirteen. He admits to using all drugs at some time, including heroin. Glass has never maintained stable and gainful employment. He states that he survives by scamming and stealing. In 1981, defendant enlisted in the Navy. However, he [illegible]ted that same year.

The victims were a fifty-five year old white male and a fifty-three year old white female. They were not related to defendant.

As a juvenile, defendant was arrested for arson and burglary and placed on probation until he was eighteen years of age. His adult record is as follows:

PRIOR RECORD

	OFFENSE	DATE	SENTENCE
1.	S/Theft & Crim. Damage to Property	10/14/80	NP.
2.	Possession of Marijuana	3/3/81	275 F & C or 60 days
3.	Armed Robbery	1/5/82	10 years, H.L., without benefit of probation, parole, or suspension of sentence.
4.	Escape	12/24/82	No disposition.
5.	Aggravated escape, Aggravated burglary, Armed Robbery, Auto Theft and First Degree Murder (present offense)	1/6/83	Released on Fugitive Warrant to Louisiana State Police to Webster's Parish Sheriff's Office

Additionally, Glass remains a fugitive from the U.S. Navy.

PASSION, PREJUDICE AND ARBITRARY FACTORS

Defendant contends that the district attorney brought before the jury the subject of the possibility of a pardon or a commutation by the governor, which is prohibited and thus requires reversal. During the penalty phase of the proceedings, defense counsel called Ms. Nancy Goodwin, a former director of the Louisiana Coalition of Jails and Prisons, to the stand to testify. Counsel asked her:

> Q. Ms. Goodwin, do you know of any lifers, persons who are serving life sentences for murder, who have been pardoned?

Ms. Goodwin answered in the negative. Defense counsel tendered and the district attorney cross-examined Ms. Goodwin:

Q. But . . . you do know people who got life prison sentences who have been released from jail, don't you?

A. Not while I've been working in, in this State.... I have not found since 1978, when I started doing my work, a person who was sentenced to life for first degree murder who got a commutation or a pardon and is now free. Maybe it happened, but I didn't know anybody. I've known a number of people who got turned down.

Q. ... has any one of [the people on death row] been executed? And it simply calls for a "yes" or "no" answer, Ms. Goodwin. Has any single one of those people been executed?

A. No, they haven't.

On redirect examination, defense counsel asked:

Q. The final decision then, Ms. Goodwin, on whether or not a sentence is commuted is left up to someone else, isn't it?

A. Yes. It rests, first of all, with the Pardon Board -- the Pardon Board has to recommend people -- and finally, it is with the governor to say "yes" or "no."

Defendant argues that the district attorney's examination of Ms. Goodwin was aimed at conveying to the jury that defendant could end up back on the streets if he received a sentence of life imprisonment as a result of a pardon by the governor. The district attorney also allegedly attempted to insinuate that the possibility of pardon depended upon whether the governor would be Treen or Edwards [the former and present governors of the State of Louisiana]. Defense counsel did not object that the questions were improper references to pardons during the questioning by the district attorney in order to preserve the issue for review under La. C.Cr.P. art. 841. However, this Court has recognized an exception in capital cases since the court has an obligation to review the record regardless, to determine whether the remarks injected arbitrariness into the proceedings. State v. Copeland, 419 So.2d 899 at 918 (La. 1982).

It is settled that the conditions under which a person sentenced to life imprisonment without benefit of probation, parole or suspension of sentence can be released in the future are not a proper consideration for a capital sentencing jury and should not be discussed in the jury's presence. State v. Copeland, supra; State v. Lindsey, 404 So.2d 466 (La. 1981) cert. denied, 104 S.Ct. 261, reh. denied, 104 S.Ct. 515 (1983). "The interjection of pardon and commutation issues provokes questions that no human mind can answer and in substance transposes the task of the governor to the jury." State v. Willie, 410 So.2d 1019 at 1034 (La. 1982). In Willie, 410 So.2d at 1033, this Court summarized the settled case law on point:

> Further, in reviewing a capital case in which an offender's potential for future release has been injected into the proceedings by the state or the trial court, this Court must presume that a death sentence was imposed under the influence of an arbitrary factor unless the record clearly indicates that the jury was properly informed of its duty and admonished to disregard the improper remarks, and the record indicates that the jury heeded the admonition. State v. Lindsey, 404 So.2d 466 (La. 1981); See also, State ex rel Williams v. Blackburn, 396 So.2d 1249 (La. 1981); State v. Monroe, 397 So.2d 1258 (La. 1981); State v. Sonnier, 379 So.2d 1336, 1364 (La. 1979) (Dennis, J., concurring in part); State v. Sonnier, supra at 1368 (on rehearing).

Under the post-Lindsey opinions rendered by this Court, only in State v. Sawyer, 422 So.2d 95 (La. 1982), U.S. cert. granted and case remanded, ___ U.S. ___, 103 S.Ct. 3567 (1983), affm'd., State v. Sawyer, ___ So.2d ___ (La. 1983), No. 81-KA-1566 (on remand from the U.S. Supreme Court), did this Court not find reversible error when the district attorney mentioned the possibility of pardon. The Sawyer opinion declared at 422 So.2d 104:

> We have never held, however, that an automatic reversal of the death penalty must follow the mere mention of the fact that R. S. 14:30's prohibition against probation or parole for one under sentence of life imprisonment does not exclude executive pardon. Each case must be decided on its own facts and circumstances.

In Sawyer, this Court concluded that the cryptic and brief comment by the district attorney made in response to defense counsel's plea to sentence defendant to "the living death of life imprisonment" did not warrant reversal. The district attorney's comment, as it appears at 422 So.2d 104, n. 19, was as follows:

> The statute speaks without benefit of probation, suspension, commutation of sentence. The statute does not speak about a pardon. The statute doesn't speak about a commutation so don't think that if you vote for first degree murder, I'm sorry, for life imprisonment that that will be the end of this matter as it related to Robert Sawyer because it's not.

This Court assessed the remarks as a "passing responsive comment" and noted that the prosecutor did not dwell on the speculative prospect of future action by the governor. This Court concluded at 422 So.2d 104:

> . . . Thus, in the contert of the entire argument, the prosecutor's responsive remark neither deflected the jury's attention from the ultimate significance and finality of the penalty recommendation nor misguided the jury's sentencing discretion by the introduction of inappropriate considerations. [Footnote omitted.]

Unlike many of the cases on point, in the instant case the possibly problematic references to pardons did not occur in the state's closing argument.[15] The remarks

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15 In brief, defense counsel also points to later statements by the district attorney in closing argument:

> Why the death penalty? Because that's the best way. It's no guarantee, no guarantee at all, but

Footnote 15 continued at page 20

relating to pardon came during cross-examination by the state of the defense witness. In response to questioning, the witness declared that she knew of no such pardons since 1978.

Defense counsel here asked the first question relating to pardons. Thus, it is clear that the defense opened the door on the subject. Moreover, counsel further pursued the topic, on redirect examination. Defense counsel did not ask the court to caution the jurors. The trial court did not admonish the jury members that it was their duty to disregard such considerations.

The information given to the jury members concerning pardon certainly fell far short of the damaging comments made by the state in Lindsey and in Willie. Ms. Goodwin continued to testify that she personally knew of no pardons obtained for offenders convicted of first degree murder since 1978. We do not find that an arbitary factor was injected through this line of questioning.

In his memorandum, defense counsel also contends that the district attorney sought to evoke the passion of the

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Footnote 15 continued

> it's the best way to stop him from doing it again. As I say, there is no guarantee but it is the best sentence we can put on him to stop it from happening again. He was already in jail for a forcible felony when this happened. . .
>
> The district attorney later stated:
>
> You have to do this very difficult thing, and I know it's difficult for you-all because I know it's difficult for me. Just like you-all, I have family, too. . . but it's something we have to do because we have families. Because we know friends and neighbors. . .

In brief defendant argues that "potential future remedies and possible threat to the familes of the prosecutor and jury are prohibited subjects for a capital sentence jury to hear from the prosecution..." We disagree with defendant's assessment of these comments. When read in context, the statements did not concern either the possibility of pardon or possible threats to the families of the prosecutor and jury.

jury when he argued concerning defendant's prior armed robbery conviction. The defendant had walked "into a convenience store to a little girl who doesn't know him and has nothing to do with trying to earn a living, pulls a knife on her and they rob the store." Defense counsel correctly notes that the PSI report states that the age of the victim in that prior armed robbery of a Midway Handy Stop was forty-one years. Although the state's representation might have been erroneous, it did not create a situation in which passion had been injected into the proceedings.[16]

STATUTORY AGGRAVATING CIRCUMSTANCES

The jury in the instant case found four statutory aggravating circumstances: (1) the offender was engaged in the perpetration of aggravated burglary [La. C.Cr.P. art. 905.4(a)]; (2) the offender knowingly created risk of death to more than one person [La. C.Cr.P. art. 905.4(d)]; (3) the offense was committed in an especially heinous, atrocious and cruel manner [La. C.Cr.P. art. 905.4(g)]; (4) the offender at the time of the offense was imprisoned after sentence for commission of an unrelated forcible felony [La. C.Cr.P. art. 905.4(f)]. The state contends that all four aggravating circumstances found by the jury clearly existed. The defense argues that the district attorney improperly argued that "just about all of the aggravating circumstances," existed in the case, while in actuality aggravating circumstances number two and four did not exist.

Defendant unpersuasively argues that La. C.Cr.P. art. 905.4(d) was not applicable under the factual

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[16]Defendant also alleges that the district attorney sought to prejudice the jury by referring to photographic exhibits not introduced to indicate that the defendant had tattoos. However, defendant's citation to the penalty phase of the transcript is incorrect and the district attorney in his answer to the defense memorandum states that the incident occurred during the guilt phase. Regardless, such a reference to tattoos would not inject arbitrariness.

circumstances in the instant case since two counts of murder were involved. This Court has held that La. C.Cr.P. art. 905.4(d) is established when the defendant by a single and consecutive course of conduct contemplates and causes a great risk to more than one person. State v. Sonnier, 402 So.2d 650 at 658 (La. 1981) (after remand), cert. denied, 103 S.Ct. 3571, reh. denied, 104 S.Ct. 36 (1983); State v. Monroe, 397 So.2d 1258 at 1274 (La. 1981), cert. denied, 103 S.Ct. 3571, reh. denied, 104 S.Ct. 36 (1983). In State v. Sonnier, supra, this Court declared that the execution of two victims lying side by side with six rifle shots clearly amounted to a single consecutive course of conduct by which defendant contemplated a great risk to more than one person. In the instant case, the two victims, with their hands and feet tied, were lying side by side face down on their bed when defendant fired one shot into the head of each. This aggravating circumstance was therefore established.

Defense counsel also argues that La. C.Cr.P. art. 905.4(f) was inapplicable since defendant was not imprisoned when the crime occurred, six hours after defendant escaped from jail and six miles away from the prison, and that the crime was not committed in an atrocious or cruel manner. La. C.Cr.P. art. 905.4(g) Even if the defendant were right, it would not affect the outcome since there are two aggravating circumstances found by the jury which are supported by the evidence. State v. Celestine, 443 So.2d 1091 at 1097 (La. 1983). Consequently we pretermitt discussion of these latter two arguments.

This Court has upheld death sentences when only one of several aggravating circumstances found by the jury was supported by the evidence (as long as defendant was not unduly prejudiced by failure to comply with procedural safeguards or by the influence of arbitrary factors during the penalty phase, and as long as the death penalty was not otherwise excessive). State v. Martin, 376 So.2d 300 (La. 1979) cert. denied, 449 U.S. 998; State v. Monroe, 397 So.2d 1258 (La. 1981) cert. denied 103 S.Ct. 3571, reh. denied, 104 S.Ct. 36 (1983).

In the instant case there is ample evidence that defendant was engaged in the perpetration of an aggravated burglary, and that he knowingly created risk of death to more than one person. Clearly two of the four aggravating circumstances are supported by the evidence.

PROPORTIONALITY OF SENTENCE

The final treatment in the sentence review in a capital case is a determination of whether the sentence in the instant case is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Supreme Court Rule 28 §1(C); State v. Marcisse, 426 So.2d 118 at 138 (La. 1983). An inference of arbitrariness arises when the sentence is inconsistent with sentences imposed in similar cases in the same jurisdiction. State v. Knighton, 436 So.2d 1141 at 1160 (La. 1983).

The sentence review memorandum by the state incorrectly lists the first degree murder prosecutions in the Twenty-Sixth Judicial District, the original venue of this case. Pursuant to the Supreme Court rule, the memorandum should have listed the first degree murder prosecutions in the Fifteenth Judicial District, the district in which the sentence was imposed. There are eleven first degree murder prosecutions in the Fifteenth Judicial District, ten other than the instant case.

State v. Aucoin, 362 So.2d 503 (La. 1978), involved the prosecution of a mother for the murder of her eight year old daughter. The killing was done by strangulation, stabbing, beating, and ultimately, by driving a car over the child. The defense claimed mental disease and drug addiction, showing that defendant had been released from Central Louisiana State Hospital just a year before the homicide. She was found guilty of first degree murder and the jury recommended life imprisonment without benefit or pardon, parole or suspension of sentence. Her conviction and sentence were affirmed by this Court.

State v. Thibeaux, 366 So.2d 1314 (La. 1978), involved the prosecution of a thirty-nine year old mother of four for the shooting death of her husband. At trial defendant claimed self-defense. The state offered no aggravating circumstances. She was found guilty of first degree murder;

the jury recommended life imprisonment. On appeal, this Court reversed, finding error in the trial court's restriction on the amount of evidence it allowed in, concerning past acts of violence by the victim towards defendant. According to the state's brief, defendant has not been retried.

State v. Francis, 403 So.2d 680 (La. 1981), involved the prosecution of a man who pulled a gun and began shooting after he saw a former girlfriend dancing with another man. A security guard and the dancing partner were killed; the woman was injured seriously. The state sought the death penalty claiming that defendant had knowingly created a risk of death or great bodily harm to more than one person. Defendant was found guilty of two counts of first degree murder. The jury recommended life imprisonment. This Court affirmed.

State v. Narcisse, 426 So.2d 118 (La. 1983), involved the prosecution of defendant for the stabbing death of his seventy-four year old great-aunt during an armed robbery. Several of the wounds could have independently caused the victim's death; she had been beaten, had broken a hip in a fall during the struggle and had suffered several broken ribs. The state urged two aggravating circumstances: that the murder was committed during an armed robbery and that the crime was done in an especially heinous, atrocious or cruel manner. Defendant was found guilty of first degree murder. On appeal this Court, found a sufficiency of evidence to support one of the aggravating circumstances and upheld both conviction and the recommended sentence of death. According to the state's Sentence Review Memorandum, this was the first death penalty handed down by a Lafayette Parish jury in approximately fifty years.

State v. Thibodeaux, 383 So.2d 1264 (La. 1980), involved the shooting death of a man who had been playing pool. The defendant shook off the restraining arms of friends and fired four times at the victim. The jury convicted him of first degree murder and returned with a verdict of life imprisonment. This Court affirmed.

Defendant also argues that the method of execution, electrocution, is cruel and unusual punishment in violation of the United States and Louisiana Constitutions. Defendant attaches an affidavit of an attorney who witnessed the electrocution of John Louis Evans in Alabama on April 22, 1983, which paints a vivid and gruesome picture of what occurs. It took three charges of electricity to kill Evans and an elapsed time of fourteen minutes.

However, electrocution has been held by courts of various jurisdictions not to be cruel and unusual punishment. See Annotation, 30 ALR 1452. Defendant notes in brief that the United States Supreme Court has never directly confronted the issue of cruelty and the methods of imposing capital punishment. Defendant therefore utilizes law review articles to support his contentions. In Wilkerson v. Utah, 99 U.S. 130 (1879), the High Court, did, however, uphold execution of death sentences by shooting as not being cruel and unusual. In State ex rel. Pierre v. Jones, 200 La. 808 at 823, 9 So.2d 42 at 50 U.S. cert den. 317 U.S. 633, 63 S.Ct. 64, 87 L.Ed. 510, (1942),[17] this Court declared that the infliction of death by electrocution was "more humane and less painful than by hanging...."

Without scientific or legal support, defendant makes the claim that lethal injection is significantly less severe and equally adequate to achieve the punishment to be inflicted. Thus, defendant contends that Louisiana's choice of electrocution is nothing more than the pitiless infliction of needless suffering. The brief concludes that since there exists the more humane method of lethal injection, electrocution is an antiquated form of torture.

Without any medical scientific or legal support for this proposition, these assignments of error lack merit.

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[17]The thrust of Jones was whether the amendment to La. R.S. 15:569 in 1940 could be considered an ex post facto law.

highway. When the victim resisted, Summit stabbed him three times and then fled. At his arrest, Summit admitted he intended to rob the man, but was thwarted when the victim fought back. The state sought the death penalty, arguing one aggravating circumstance, that the murder had been committed during an attempted armed robbery. Defendant, in mitigation, argued the lack of prior significant record (i.e., no felony convictions). Finding the aggravating circumstance urged by the state, the jury convicted and recommended the death penalty.

State v. Jimmy Wingo, No. 84-KA-0260, is currently on appeal to this Court. Jimmy Wingo, of course, is defendant Glass' accomplice in the perpetration of the very murder which we here review. Not only did this jury recommend death for Glass in connection with the murder of Mr. and Mrs. Brown, but also a different jury who tried Jimmy Wingo after Glass obtained a severance also recommended death for the accomplice Wingo.

The Aucoin, Thibeaux, Francis and Thibodeaux juries recommended life imprisonment. Those cases in which no death sentence was recommended involved situations where there was some type of mitigating evidence offered. In State v. Aucoin, mental disease was involved. State v. Thibeaux was a domestic dispute. The situation in State v. Francis involved barroom jealousy; State v. Thibodeaux was also a barroom argument. The four remaining cases resulted in the imposition of the death penalty. Fuller, Narcisse, Wingo and Celestine all involved murders perpetrated upon elderly victims in their homes. Distinguishable from the four cases in which the death penalty was not recommended, these cases involved cold-blooded murder with no clear mitigating circumstances involved.

In the instant case, these two murders were also cold-blooded. Mrs. and Mrs. Brown, in their fifties, were evidently executed in order that they could not identify the

armed men who had broken into their home in the dead of night on Christmas Eve, 1982. Defendant pulled the trigger. Although defense counsel argues that defendant was coerced into killing the couple, that claim was established only by defendant's testimony. The record does not establish that Glass' death sentence was disproportionate when it is viewed in light of sentences for similar offenses.

Decree

Accordingly, for the reasons assigned, defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.

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[Editorial Note to West Publishing Company: This appendix is not to be published.]

APPENDIX

ASSIGNMENT OF ERROR NO. 1

With this assignment of error, defendant contends that the trial court erred in failing to quash the indictment returned by a grand jury selected from a venire from which unregistered electors had been systematically excluded.

In brief, defendant abandons the argument relating to the fact that the sole source of individuals for the venire in Webster Parish is the voter registration rolls since he had made no showing in the record to identify a cognizable group within the community which has been systematically excluded by virtue of their failure to vote. However, he reserves his right to make the proper evidentiary showing to support this argument in an attempt to obtain post-conviction relief.

Since this case involves imposition of the death penalty, we will address assignments not argued as a matter of policy. State v. Monroe, 397 So.2d 1258 at 1272 (La. 1981), cert. denied, 103 S.Ct. 3571, reh. denied, 104 S.Ct. 36 (1983); State v. Berry, 391 So.2d 406 at 411 (La. 1980), cert. denied, 451 U.S. 1010. However, there is no merit to this assignment of error.

In State v. George, 371 So.2d 762 at 764 (La. 1979), cert. denied, 444 U.S. 953, rehearing denied, 444 U.S. 1027 (1980), this Court concluded, as it had previously held, that such an argument relating to the exclusive use of voter registration rolls to draw up the general venire was meritless since the class excluded consisted of persons qualified as prospective jurors, but not registered to vote, a class without any distinguishable common characteristics.

> While a defendant has a constitutional right to be indicted by a grand jury and tried by a petit jury chosen from a fair cross-section of the community, he is not entitled to juries reflecting with mathematical precision the composition of the community. State v. Lawrence, 351 So.2d 493 (La. 1977); State v. Anderson, 315 So.2d 266 (La. 1975); State v. Millsap, 258 La. 883, 248 So.2d 324 (1971). A defendant who contends that he is deprived of juries which represent a fair cross-section of the community has the burden of establishing a prima facie case of discrimination. State v. Jones, 263 La. 1012, 270 So.2d 489 (1972); State v. Kilbourne, 260 La. 569, 256 So.2d 630 (1972). In State v. Daigle, 344 So.2d 1380 (La. 1977), defendant contended that the exclusive use of voter registration rolls to draw up the general venire violated his right to a fair trial by a representative cross-section of the community. While expressing concern over the propriety of using voter registration lists as the single source from which the jury venires were compiled, we held, however, that "we cannot say that the use of voter lists without any showing in the record of any discrimination against a class of people establishes that the jury pool did not represent a fair cross-section of the community." Likewise, in State v. Unger, 362 So.2d 1095 (La. 1978) and State v. Lawrence, supra, we rejected similar contentions on the ground that defendant failed to demonstrate a systematic exclusion of any identifiable segment of the community.

See also, State v. Western, 355 So.2d 1314 (La. 1978); State v. Gibbs, 355 So.2d 1299 (La. 1978).

As defendant concedes in his brief, the record of the instant case does not make the necessary showing. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 2

By this assignment the defendant contends that the trial court erred in failing to recuse Mr. Henry Newton Brown, Jr., District Attorney, in the prosecution of defendant for the homicide of Newton and Erline Brown. It was shown that the victims were related to Judge Charles A. Marvin of the

Louisiana Second Circuit Court of Appeal. The law firm of First Assistant District Attorney James Johnson was found to be the law firm (previously with Charles A. Marvin as a partner) that had represented the victims. Judge Marvin's daughter was also married to the victims' son.[1]

La. C.Cr.P. art. 680(1) provides: "A district attorney shall be recused when he: (1) Has a personal interest in the cause or grand jury proceeding which is in conflict with fair and impartial administration of justice." (Emphasis provided.) This Court has held that in an action to recuse the district attorney, the defendant bears the burden of showing by a preponderance of the evidence that the district attorney has a personal interest in conflict with a fair and impartial administration of justice. State v. Vaccaro, 411 So.2d 415 at 425 (La. 1982); State v. Marcal, 388 So.2d 656 at 659 (La. 1980), appeal dismissed, 451 U.S. 977, reh. den. 452 U.S. 973. See also, State v. Snyder, 256 La. 601, 237 So.2d 392 (1970); State v. Melerine, 236 La. 881, 109 So.2d 454 (1959).

District Attorney Brown testified that the victims were not related to him in any way and that he did not know them personally. The minutes of the proceeding reflect that a Stipulation of Fact signed by Mr. James Johnson, a First Assistant District Attorney under Brown, stated that Johnson had been a law partner with Judge Charles A. Marvin from 1966 to 1975, that he had been an assistant district attorney in the office of then District Attorney Charles A. Marvin from May 26, 1975 to June 26, 1975, that he is a partner with Judge Marvin

[1]The record in the instant case does not contain the transcript of these proceedings. However, the transcript of this hearing can be found in Vol. V of State v. Wingo, No. 84-KA-0260.

in a partnership known as Sugar Creek Development Company, that his law firm has represented the brother and brother-in-law of the victims in the past and has filed succession proceedings for the two victims. Mr. Johnson also stipulated that Judge Marvin was the father-in-law of the victims' son.

Brown testified that he was promoted to District Attorney when Judge Marvin won his seat on the Second Circuit Court of Appeal. He told the court that he had not spoken to Judge Marvin prior to the indictments in the cases of Wingo and Glass, but that he had discussed the law involved in the case with the judge since then. The trial court denied the motion to recuse Brown stating that the court did not find a showing that defendants would not "get a fair and impartial administration of justice from Mr. Brown's office" and that the D.A.'s relationship to the victims "is not close enough to warrant it [recusal] as specified in the Code of Criminal Procedure Art. 680." The defense objected to the ruling.

In brief, defense counsel argues that Judge Marvin consulted with Mr. Brown about the case and furnished information and materials to aid in the prosecution, and that Judge Marvin was in attendance throughout the trial and often prompted Mr. Brown during the proceedings. The state rebuts defendant's contentions and argues that no evidence was presented by the defense at the hearing on the motion. The prosecutor contends that defendant's brief contains false statements and statements not supported by the record. The state points out that the D.A. testified that he was not related to the victims, nor did he personally know Mr. Newton Brown. The prosecution argues that the D.A., after being appointed to his position, was elected to the unexpired term and re-elected to a full term. The state contends that the evidence demonstrated that the allegations concerning Judge

Marvin's part in the prosecution of the case were false.

To support the contention concerning Judge Marvin's presence and participation during the trial, defendant cites an instance in which defense counsel objected to members of the audience prompting and assisting Mr. Brown.[2]

In brief, defendant additionally contends that the district attorney was overzealous and in prosecuting the instant case. He cites two examples: (1) in defendant's case the district attorney argued that Glass' story that Wingo entered the victims' house armed with a roll of wrenches was uncorroborated, and then in Wingo's trial, the district attorney introduced a photograph depicting the roll of wrenches; (2) the district attorney attempted to mislead the jury into believing that there were no charges against the state's star witness, Gwen Hill, when she had been promised assistance with Texas charges by a Louisiana deputy sheriff in exchange for her cooperation. Although defense counsel was able to elicit that information from Ms. Hill, he argues that the district attorney was acting to violate defendant's rights. Defense counsel's examples of overzealousness on Mr. Brown's part are not convincing to show that the district attorney could not fairly seek the ends of justice in prosecuting this murder case.

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[2]The record does not indicate what assistance was forthcoming from the audience nor who was offering his/her help. When defense counsel stated that if it continued, counsel would ask that the courtroom be cleared, Mr. Brown defensively declared: "I have handled this case alone." After the trial court called the attorneys to the bench, defense counsel, Mr. Armstrong, facetiously commented that there were a "couple in back that might want to come up..." At that point, a bench discussion off the record occurred and then the trial proceeded.

It is worth noting furthermore that Judge Marvin of the Second Circuit Court of Appeal has not participated in this case in any respect.

Upon review of the minutes in the instant case and the transcript provided in State v. Wingo, No. 84-KA-0260, we conclude that the defendant did not carry his burden under the La. C.Cr.P. art. 680 and that the trial court's ruling on the motion to recuse was correct.

Accordingly, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 4

In this assignment of error, defendant contends that the trial court erred when it denied his motion to suppress a letter which was written by defendant to his mother[3] and entrusted to the police for delivery to defendant's mother. The contents of the letter photocopied by the police were derivatively used by the prosecutor at trial during cross-examination of defendant's mother.

Glass was arrested in San Diego, California and was to be escorted back to Louisiana by Louisiana authorities, Detective Flowers and Deputy Haynes. At the San Diego County

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[3]The letter says:

> Mama -- I hope this letter find you doing well. As for me, I'm sure you know my situation. I really don't know what I should say, but I guess there's not much that I can say. I want you to know that I love you more than anyone or anything in this world. There is -- please do not grieve for me. I know that I'm going to die for what I have done. I'm not scared of dieing but I am scared of hurting you any more. I only hope and pray that in spite of what I have done you still love me. I want you to know that everything, even though I may die we will always be together. My soul will be with you every step of your life, and when your life is over we will be together in God's kingdom. Pray for me, Mother, as I am doing. Ask God to see fit to save my soul. One day we will be together again. I don't know as of yet where they will be keeping me, but you can find out from Mr. Haynes. Please come see me, Mama. I need to know that you still care. Well, I must close for now. I will write you as soon as possible. Take care God bless, and remember I love you always; Love, your son, Jimmy.

Jail, defendant was given his rights under Miranda and he executed a standard Louisiana State Police waiver form. At the motion to suppress hearing,[4] Detective Flowers testified that he read defendant's rights to him, explained them to Glass, then checked them off on the waiver form. This was also recorded. Defendant indicated to the detective that he knew and understood his rights. Detective Flowers testified that after boarding a plane for the trip back to Louisiana, defendant asked to write a letter. The officers had informed defendant that there was a good chance that he would get the death penalty. After the plane took off, defendant was given a notebook and a pen and wrote his letter to his mother. Upon finishing the letter, Glass asked Detective Flowers if he wanted or needed to read it. Detective Flowers answered that he did not have to read the letter. Defendant tore the letter from the pad, folded it, wrote "Caroline Glass from Jimmy." and gave it to Deputy Flowers who handed it to Deputy Haynes who placed it in his coat pocket. Before delivering the letter Deputy Haynes photocopied it, turned a copy over to the district attorney, and gave the letter to another policeman to deliver to Glass' mother.

Defendant filed a motion to suppress the letter contending that it was illegally seized, that defendant was not informed of his rights prior to "seizure" of the letter and that the seizure violated his constitutional right against self-incrimination. The trial court denied the motion to suppress.

At trial defendant urged a new ground for excluding the letter, namely, that its prejudicial effect outweighed its probative value. Defense counsel argued that

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[4]The record in the instant case does not contain the motion to suppress hearing transcript. However, the transcript can be found in State v. Wingo, No. 84-KA-0206.

the letter had no evidentiary weight; a man might write anything to his mother in order to gain her support during her time of tribulation, defense counsel contended. The trial court still ruled the letter admissible and reiterated his earlier ruling that the statements made by defendant in the letter were free and voluntary.[5]

The state's argument that the issue of the motion to suppress ruling is not before this Court since the state did not actually offer the letter into evidence at trial is not persuasive. Since this is a death case, equally unpersuasive is the state's argument that under La. C.Cr.P. art. 841 defendant could not complain on appeal since he did not object to the mother's testimony at the time.[6] In any event, counsel had moved to suppress the letter and thereby alerted the trial judge of the action he wished the Court to take; in view of the court's denial of the motion, further objection at trial was unnecessary. Defendant argues that the state could not avoid the consequences of using the letter as evidence at trial by so questioning defendant's mother; Mrs. Glass' answer was a derivative fruit of the seizure of the letter which occurred when Deputy Haynes photocopied it.

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[5]At trial, the state did not introduce the letter into evidence during its case in chief. Rather, it was during cross examination of defendant's mother that the prosecutor asked whether her son had made a particular statement which statement was taken directly from the letter. On redirect examination defense counsel asked defendant's mother to read the entire letter. In brief, counsel contends that he had the entire letter read to the jury in order to mitigate the damage done by the selected reading of just one sentence from the letter by the district attorney.

[6]Under Supreme Court rule 28, §1, this Court has been given the responsibility of reviewing the jury's recommendation of the death penalty to determine whether the sentence was influenced by passion, prejudice or any arbitrary factor. This Court must therefore conduct an independent review, whether or not defense counsel objected to an alleged error, to decide if any of the factors contributed to the jury's death penalty recommendation. See State v. Sonnier, 379 So.2d 1368 at 1371 (La. 1980) (on rehearing).

On appeal defendant analogizes the circumstances under which the letter was written to instances where prisoners' mail is censored. He contends that his asking Detective Flowers whether the detective "wanted" to read the letter, should be construed as asking whether the detective had to censor the letter. Defendant then argues that the reading and photocopying of the letter were an unconstitutional search and seizure.

We disagree w'th this analysis of the situation. Jurisprudence concerning censorship of prisoners' mail is inapposite. Defendant never intended to mail the letter, rather he gave it to law enforcement officers to deliver to his mother. It is also clear that there was no Fourth Amendment violation of defendant's right to be free from unlawful search and seizure. The Fourth Amendment's requirement of a search warrant comes into play only if a justifiable expectation of privacy is to be invaded. State v. Ford, 379 So.2d 729 at 730 (La. 1980).

Defendant asked Detective Flowers if the detective wanted to read the letter, which he merely folded over and gave to the officers for delivery to his mother. Under the circumstances, we have concluded that defendant had no expectation of privacy in the contents of the letter. Thus, he had no legitimate claim to Fourth Amendment protection and the trial judge was correct in refusing to grant defendant's motion to suppress.

Accordingly, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 6

With this assignment of error, defendant contends that the trial court erred in refusing to grant a continuance to enable defense counsel to acquire evidence by means of a subpoena duces tecum, and instead, by ordering instanter service of the subpoena in Vivian, Louisiana, and in San Diego, California.

In brief, defense counsel outlines that he was not appointed until January 18, 1983. The case was transferred to the 15th Judicial District Court in Lafayette and the trial date was set for March 21, 1983. Defendant's motion for a continuance heard on March 18th was granted and the trial date was set for April 4, 1983. On March 18, 1983, defendant filed a motion for subpoena duces tecum to produce employment records of and any police reports made by Jimmy Wingo while he was a law enforcement officer. At that same time there was also filed a motion for a subpoena duces tecum to produce military records of defendant. Defendant contends in brief that the court directed that both requests (including the out-of-state request for military records) be submitted to the clerk of court for ordinary service. Counsel states that they had to return to their offices in Bossier City in order to prepare the written requests. They then mailed the request to the Clerk of Coirt in Lafayette, but by March 31, 1983, neither had been served. A motion for a continuance was then mailed and the court conducted a hearing on defendant's motion for continuance immediately preceding commencement of trial.[7]

At the hearing on the motion, it was argued that the continuance was necessary because defendant had not obtained either his military records or the employment records of Jimmy Wingo. Counsel informed the court about the fact that the district court had not received their request for the subpoenas and that there was little prospect of having them complied with during trial since they were being issued instanter even though counsel had mailed the request days

[7]On the morning of trial defense counsel was told that the subpoena requests had just been received by the Clerk of Court. The court then ordered the subpoenas to be issued instanter.

before. Defense counsel argued that the two defense attorneys had not had time to prepare properly for the case.[8] The trial court noted that the subpoenas were issued that morning upon receipt of the requests. The motion was denied and trial was begun.

La. C.Cr.P. art. 712 provides that a motion for continuance, if filed timely, "may be granted, in the discretion of the court, in any case if there is good ground therefor." The article commits a motion for continuance to the sound discretion of the trial judge. The ruling will not be reversed except upon a showing that he abused his discretion. State v. Knighton, 436 So.2d 1141 at 1147 (La. 1983). See also, State v. Benoit, 440 So.2d 129 (La. 1983). Whether a refusal to grant a continuance was justified depends primarily on the circumstances of the particular case. This Court has declined to reverse a conviction absent a showing of specific prejudice caused by the denial of a continuance. State v. Gaskin, 412 So.2d 1007 at 1012 (La. 1982); State v. Dupre, 408 So.2d 1229 at 1231 (La. 1982); State v. Ordonez, 395 So.2d 778 at 782 (La. 1981).

In the instant case, defendant has made no showing that he could have presented a much better defense had

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[8]The motion for continuance actually listed four grounds: (1) that the sanity commission reports had not been received; (2) defense counsel had not been provided with defendant's rap sheet; (3) that counsel had not been able to secure defendant's military records; (4) that counsel had not been able to secure the employments records and reports of Jimmy Wingo when he had been a police officer. Nos. 1 and 2 above had been satisfied prior to the hearing on the matter.

he secured his military records and the employment records of Jimmy Wingo.[9] In brief, defendant does not argue that those records, not obtained by counsel during the trial, would have provided the defense with the help counsel anticipated. Since defendant has not shown that he was prejudiced by not having those documents in his possession at trial this Court does not find an abuse of discretion on the part of the trial court. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 7

By this assignment of error, defendant contends that the trial court erred when it sustained the state's challenge for cause of nine jurors under the authority of La. Cr.P. art. 798(2)(a), and this facilitates selection of a "conviction-prone" jury.

La. C.Cr.P. art. 798(2) provides:

> It is good cause for challenge on the part of the state, but not on the part of the defendant, that:
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> - - -
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> (2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it unmistakably clear (a) that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him, or (b) that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt.

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[9]Defendant concedes in brief that the two subpoena requests were "shots in the dark." Counsel was hoping that the military records of defendant would have shown something useful concerning his mental condition. Defendant sought to obtain the employments records and reports of Wingo in order to bolster the defense claim that Wingo had given Miranda warnings to others while he worked as a policeman and thus was aware of things which aid the police in capturing individuals for the crimes that they commit (for example, having someone call out the offender's name). It was thus defendant's contention that Wingo decided to kill Mr. and Mrs. Brown when defendant inadvertently mentioned Wingo's name in front of the victims. At that point, Wingo, with his background as a police officer, determined to force defendant into shooting the couple who could identify him.

The minutes reflect that nine jurors were excused for cause under La. C.Cr.P. art. 798: (1) Walter Sinegal; (2) Lilly Jenkins; (3) Janet Burleigh; (4) Dawn Babineaux; (5) Euora Broussard; (6) Jimmie Jacobs; (7) Kevin Thomas; (8) Dorothy Cormier; (9) Rose Laws (questioned as an alternate). Defendant also lists in his procedural summary that Vernon Boudreaux was so excused. The minutes do not reflect that La. C.Cr.P. art. 798 was the basis of that challenge; however, it might have been. There is no mention in the minutes as to whether the challenge by the state was made under La. C.Cr.P. art. 798(2)(a) or (b). Defendant in his procedural summary claims that La. C.Cr.P. art. 798(2)(a) was the ground for the challenges of those jurors. In brief, defendant states that his argument relates only to La. C.Cr.P. art. 798(2)(a). Although defense counsel in his procedural summary lists the nine jurors so challenged and states their responses to voir dire questioning, the argument itself does not mention the trial court's error in allowing each individual challenge for cause. The individual jurors are not even mentioned by name in defendant's argument in brief. The argument is aimed at La. C.Cr.P. art. 798(2)(a) and not at the individual trial court rulings, apparently.

Defendant contends that there is considerably more empirical data presently available than that available at the time when the U.S. Supreme Court decided Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).[10] Defendant cites a 1980 federal opinion, Grigsby v. Mabry, 637 F.2d 525 (8th Cir. 1980) in which the case was

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[10] In Witherspoon v. Illinois, 391 U.S. 510 (1968) the U.S. Supreme Court held that a sentence of death could not be imposed upon a defendant tried by a jury from which potential jurors, who voiced a general objection to the death penalty or expressed conscientious or religious scruples against its infliction, were excluded. For a discussion of post-Witherspoon cases, see generally, 39 ALR 3d 550.

remanded for an evidentiary hearing on factual issues, one of which was whether death qualified jurors were more likely to convict than jurors selected without regard for their view on the death penalty. On remand, the federal district court concluded at 569 F. Supp. 1273, at 1321-23 (E.D. Ark. 1983).

> "The evidence introduced here makes it abundantly clear that juries death-qualified under Witherspoon standards are not as representative of the community as they could, and should, be, and, therefore, do not serve the objective of interposing between the state and the defendant the conscience and broad collective wisdom of that community. It is also clear that such juries cannot be considered fair and impartial with respect to the issue of the guilt-innocence of defendants in capital cases.
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> * * *
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> The appropriate action would seem to require the conclusion that death-qualified juries are not only "uncommonly," but also unconstitutionally, prone to convict.

This Court has repeatedly held that La. C.Cr.P. art. 798 is constitutional and that it comports with the U.S. Supreme Court's decision in Witherspoon v. Illinois, 391 U.S. 510 (1968). State v. Jordan, 420 So.2d 420 at 423 (La. 1982). See State v. Monroe, 397 So.2d 1258 (La. 1981) cert. denied, 103 S.Ct. 3571, reh. denied, 104 S.Ct. 36 (1983); State v. Williams, 392 So.2d 619 (La. 1980); State v. Miller, 391 So.2d 1159 (La. 1980); see also, State v. Perry, 420 So.2d 139 (La. 1982), cert. denied, 103 S.Ct. 2438 (1983); State v. George, 371 So.2d 762 (La. 1979), cert den. 444 U.S. 953 (1979). This Court has acknowledged the U.S. Supreme Court opinion in Adams v. Texas, 448 U.S. 38, 50, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), with its statement that "the state may bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oath." Therefore, the standard of this Court has remained consistent. There is no merit to a defendant's contention that his constitutional right

to a trial by a jury selected from a fair cross-section of the community has been violated wherein prospective jurors have been properly excluded under La. C.Cr.P. art. 798 and Witherspoon. State v. Kirkpatrick, 443 So.2d 546 at 555, 556 (La. 1983).

The thrust of the defendant's argument relates to a contention that there is significantly more empirical data presently available on the issue of juries "organized to convict" than there was at the time of Witherspoon. This Court has declined to hold, upon only a defendant's mere contention that such a death- qualified jury is more likely to vote to convict defendant, that defendant's rights have been violated. State v. James, 431 So.2d 399 at 402 (La. 1983) cert. denied, 104 S.Ct. 263, reh. denied, 104 S.Ct. 520 (1983); State v. David, 425 So.2d 1241 at 1250, n. 1, (La. 1983). However, this Court has left the issue open to argument based on new data in this Court, not on mere speculation. State v. James, supra. No new data has been made part of the record in this case. All references to any such data are those contained in a federal district court opinion, Grigsby v. Mabry, 569 F. Supp. 1273, (E.D. Ark. 1983).[11]

This Court is not swayed by the information contained in that federal district court opinion, and not part of the record in the instant case. This assignment of error lacks merit.

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[11]Examples of the empirical data discussed in Grigsby are: Winick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 Mich.L.Rev. 1, 65-66 (1982); Berry, Death-Qualification and the "Fireside Induction," 5 U.Ark. Little Rock L.J. 1,2 (1982); Bronson, Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence From California, 3 Woodrow Wilson, J.L. 1981; Haney, Juries and the Death Penalty: Readdressing the Witherspoon Question, 1980 Crime and Delinq. 512.

ASSIGNMENT OF ERROR NO. 8

With this assignment of error defendant contends that the trial court erred in admitting gruesome color photographs showing blood, wounds and other details when the defense offer to make any stipulation necessary to avoid the prejudicial effect was refused by the district attorney.

While Officer Jimmy Batton of the Webster Parish Sheriff's Office was on the stand (he was one of the first officers on the crime scene), photographs of the area, the house and the bedroom were identified by him. Defense counsel objected to state exhibit S-13A, which was a color photograph which included a slight portion of Newton Brown's elbow and part of the back of his head in the picture of the left part of the bedroom. It showed the blood and the bloody bedding. The jury was retired and counsel took this opportunity to contest as well the other large, color, glossy photographs. Counsel argued that this Court has previously disapproved of such color photographs. Defense offered to stipulate to the fact that the victims were tied, that they were killed by a gunshot wound to the back of the head and that there was plenty of blood. Counsel also stated that defendant intended to take the stand and testify as to the nature of the victims' deaths. The defense offered to stipulate to everything of which the district attorney claimed the pictures were probative. Counsel claimed that introduction of the photographs would be inexcusably prejudicial and argued that jurisprudentially if the defense made a plenary stipulation, then the photographs should be excluded. Counsel asked the district attorney to itemize the probative value of the gruesome photographs to be introduced and the defense would so stipulate in front of the jury. The trial court denied the objection as to S-13A and called in the jury. The proceedings continued.

After the testimony by the pathologist, the district attorney sought to introduce the S-35 series and the S-16 series of photographs. The jury was retired and defense counsel again elaborated on his previous objection. The defense objected to the entire S-35 series and to S-16J, 16I, 16H, 16G, 16F, 16E and 16D. Without citing case law, counsel argued against the color photographs and objected to the pictures depicting the bloody bodies. Counsel contended that the case law clearly indicated that the stipulation should bar the introduction.

After looking at the photographs objected to on the grounds only of being in color, the trial court, citing State v. Harvey, 358 So.2d 1224 (La. 1978), admitted them. The court then approached the issue of the stipulation. The district attorney felt that the photographs were essential since he felt that anyone, viewing the photographs, would conclude that the man who shot Mr. and Mrs. Brown was kneeling between the two bodies when he put the gun to their heads.

Defense counsel offered to stipulate as follows:

> Newton and Erline Brown were killed by two contact gunshot wounds--one to the back of each of their heads. That they were bound and gagged at the time. They were lying face down and turned towards each other when the shooting occurred. That the gun was held above Mr. Brown's head and perpendicular to the bed, with the muzzle placed upon material with which he was gagged when he was shot, when the shot was fired killing him. That the gun was held above Mrs. Brown's head and angled somewhat to the right when the shot was fired killing her.[12]

The district attorney contended that the stipulation did not

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[12]That stipulation was ultimately read to the jury even though the trial court did admit some of the photos.

show the manner in which the victims were killed and that the photographs were thus necessary. The district attorney argued that the jury could use Dr. McCormick's testimony and the pictures to decide where the killer was really positioned.

The court then allowed the defense to ask Dr. McCormick out of the jury's presence whether the photographs showed with absolute certainty that the gun holder was positioned between the two bodies. The doctor answered negatively. The court noted that the stipulation did not cover the entrance and exit wounds and the testimony of the doctor. Counsel reiterated that the defense had orally agreed to stipulate to the location of the entrance and exit wounds and attach to its stipulation views of the head showing the wounds. The trial court ruled:

> In view of the stipulations made, the Court does find that most of the photographs, all of the photographs have probative value, and that the probative value outweighs any prejudicial effect. The Court, however, will exclude photographs which it finds to be cumulative in nature, and as such the Court will exclude S-35; -35A; -35B; -35C; -35G; -35F. And I'm going to give these to the Clerk, make them a part of the record. Also, the Court will exclude -16R; -16Q; -16B; -16C; -16K; -16L; -16M; -16P.

Defense counsel reserved an objection to the trial court's ruling.

It is well settled that the admission of gruesome photographs will not be overturned unless it is clear that the prejudicial effect of the photographs outweighs the probative value. It is also well settled that photographs of murder victims are admissible to prove corpus delicti, to corroborate other evidence establishing cause of death and to provide identification of the victim. State v. Brogdon, 426 So.2d 158 at 169 (La. 1983). See also, State v. Germain, 433 So.2d 110 (La. 1983); State v. Parker, 425 So.2d 683 (La. 1983); State v. Tonubbee, 420 So.2d 126 (La. 1982), cert den. 103 S.Ct. 1769,

reh. den. 103 S.Ct. 3121 (1983); State v. Perry, 420 So.2d 139 (La. 1982), cert den. 103 S.Ct. 2438 (1983). Photographs that illustrate any fact, shed light upon any fact or issue in the case or show relevancy to describe the person, place or thing depicted are generally admissible. State v. Kirkpatrick, 443 So.2d at 555; State v. Lindsey, 404 So.2d 466 at 475 (La. 1981) cert. denied, 104 S.Ct. 261, reh. denied, 104 S.Ct. 515 (1983); State v. Bodley, 394 So.2d 584 at 590 (La. 1981); State v. Landry, 388 So.2d 699 at 704 (La. 1980), cert den. 450 U.S. 968 (1981).

In brief, defendant contends that the probative value of prejudicial evidence is lessened in weight by the defense's offer to formulate a plenary stipulation. This Court has held that the existence of an offered stipulation necessarily bears upon a balancing of the probative value of the allegedly gruesome photographs against their prejudicial effect; nevertheless, the decision remains one for the court. State v. Bodley, 394 So.2d at 591; State v. Landry, supra. "[T]he state cannot be robbed of the fair and legitimate moral force of its case merely because the stipulation is offered." (citations omitted). State v. Lindsey, 404 So.2d at 475. See also, State v. Gilmore, 332 So.2d 789 (La. 1976).

Nevertheless, citing jurisprudence which has consistently held that the admission of gruesome photographs was not reversible error, defendant contends that counsel's offer to stipulate to everything that the district attorney intended to prove by using the photographs, distinguishes this case. However, it is clear from the record that the prosecutor primarily hoped to utilize the photographs in order to convince the jury that defendant actually crawled into the bed between the two victims and then placed the gun to their heads and fired. Thus, the stipulation was unsatisfactory to the district attorney who felt that rejection of the photographs would have robbed the state of the moral force of its case, and

kept from the jury a graphic illustration that the story told by defendant from the stand was not true.

The trial court had excluded a number of the extremely gruesome pictures. The ones he admitted are listed as follows: photographs 16D-J showed the lower part of the victims' bodies, their tied hands and feet. Only S-16J included some of the blood on Mr. Brown's undershirt in showing his tied hands. S-16-N and S-16-O showed the position of the bodies from an angle which showed little of the blood that was plentiful. S-16 and S-16-A depicted the bodies as they were found with the sheet and blanket pulled up. S-35-D showed the cleaned entrance wound to Mr. Brown's head. S-35-H and S-35-I showed the cleaned entrance and exit wounds of Mrs. Brown.

Even taking into account the fact that the defense's offer to stipulate diminished considerably the probative value of the photographs (see State v. Harvey, 358 So.2d at 1228, 1229), we do not conclude that the trial court abused its wide discretion in determining the probative value of these photographs outweighed the prejudicial effect.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 12

With this assignment of error defendant contends that the trial court erred in permitting the prosecutor, over defense objection, to argue to the jury that the circumstances of defendant's apprehension in California indicated an attempt to commit another armed robbery.

In rebuttal closing argument,[13] the district attorney chronicles defendant's actions subsequent to the

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[13]Defendant does not give a citation to the particular instance in the transcript. In looking over the closing arguments, it appears that this is the incident to which defendant refers.

crime which show no remorse. He stated: "And then he went on out to California, did a little sight-seeing, spent all the money, met another man with a knife in his pocket." Defense counsel objected that the state was going beyond the defense's closing argument. The objection was overruled. The district attorney continued:

> He goes out to California, he meets a man on the boardwalk or there in San Diego somewhere who has a big, old knife in his back pocket. He has two knives in his pocket. He doesn't have any money, he's broke now.
>
> * * *
>
> He's broke now and they go to the airport, with their knives, broke -- he is anyway -- to watch the people come off the planes.

Again defense counsel objected, which objection was overruled. Mr. Brown continued:

> Remember, he was convicted of armed robbery -- he said he's just an armed robber; Wingo is a big burglar. There's a big difference between burglary and armed robbery. Armed robbery is one of the worst crimes you can have around here. But remember his armed robbery in Springhill -- a little girl who was singly operating a Handi-Pak store, and little Quick-Mart -- he pulled knife on her. And he robbed her. The man is in the airport in San Diego with a knife, with no money, watching the people get off the airplanes. How would you feel him being in your airport, no money and a knife, watching the people getting off the airplanes?

Since defense counsel objected to the allegedly improper argument, even though counsel did not move for a mistrial or request an admonition thereafter, the issue has been properly preserved for treatment on appeal. See State v. Williams, 373 So.2d 1278 at 1280 (La. 1979); State v. Hamilton, 356 So.2d 1360 at 1363 (La. 1978).

In brief, defendant contends that these remarks by Mr. Brown, the district attorney, in rebuttal closing argument, constitute "other crimes" references which would mandate a mistrial under La. C.Cr.P. art. 770(2).[14] Defendant argues that the district attorney was inviting the jury to speculate that defendant was actively seeking a potential victim to rob when he was apprehended in the airport in California. Even if that were the state's intention, looking for a victim without more is not another crime committed or alleged to have been committed by defendant as to which evidence is inadmissible. (Cf. La. R.S. 14:27 which defines "attempt" which can constitute an "other crime.")

Furthermore, in brief, the state points out that defendant himself testified to the circumstances surrounding his arrest. The district attorney thus contends that he was only arguing from the evidence presented. In an attempt to negate the defense claim that defendant was remorseful, the district attorney related defendant's actions after he shot the two victims. Defendant's movement showing no remorse culminated in his arrest at an airport in San Diego, California.

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[14] La. C.Cr.P. art. 770 in pertient part provides:

> Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official during the trial or in argument, refers directly or indirectly to:
>
> * * *
>
> (2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible;

La. C.Cr.P. art. 905.3 provides:

> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances.

As discussed more fully in the sentence review section of this opinion, there is ample evidence in the record to support the jury's finding in the instant case two aggravating circumstances: that defendant was engaged in the perpetration of aggravated burglary, and that the offender knowingly created risk of death to more than one person.

Assuming that the jury erred in finding that the offense was committed in an especially heinous, atrocious and cruel manner, or that the offender at the time of the offense was imprisoned after sentence for the commission of an unrelated forcible felony, it does not change the end result. "The lack of evidence as to one statutory aggravating circumstance does not invalidate the death sentence when other aggravating circumstances found by the jury are supported by the evidence." State v. Celestine, 443 So.2d 1091 at 1097 (La. 1983), citing State v. Narcisse, [426 So.2d 118] at 138 [(La. 1983)]; See also, State v. Mattheson, 407 So.2d 1150 (La. 1981) cert. denied, 103 S.Ct. 3571, reh. denied, 104 S.Ct. 37 (1983); accord, Zant v. Stephens, ___ U.S. ___, 103 S. Ct. 2733 (1983).

This assignment lacks merit. See Sentence Review, infra.

ASSIGNMENTS OF ERROR NOS. 3 AND 15

With these assignments of error, defendant contends that the death penalty is cruel and unusual punishment, especially death by electrocution.[16]

This Court has held that imposition of the death penalty for the crime of first degree murder does not constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution or its Louisiana counterpart, La. Const. art. 1, §20. State v. Myles, 389 So.2d 12 at 15, 16 (La. 1979).

In an attempt to concentrate on arguments not previously made and considered by this Court, defendant argues in brief that the death penalty, once imposed, is permanent and irrevocable. Without citation, defendant argues that what is found to comport with due process of the law today (for example, use of gruesome photographs when the defense offers to stipulate to every relevant fact depicted, and death qualification of a jury) may be determined in the future to lack due process. At that future date, with the possible retroactive application of the new rule, defendant cannot be then afforded rights deprived him at his trial today if he has been sentenced to death. This argument is not persuasive.

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[16]Assignment of Error No. 3 as listed by defendant, actually involves a contention that the Louisiana death penalty statute is unconstitutional because of a lack of adequate safeguards. In the beginning of his discussion of this argument, defendant mentions assignment of error number 3; however, defendant does not actually argue the assignment in brief. Since this is a death case, the assignment of error will nonetheless be considered as a matter of policy. State v. Kirkpatrick, supra; State v. Monroe, supra. The Louisiana death penalty statute and the procedure it sets out have been held constitutional in light of the guidelines enunciated by the United States Supreme Court. See State v. Knighton, 436 So.2d 1141 (La 1983).

Defendant also argues that the method of execution, electrocution, is cruel and unusual punishment in violation of the United States and Louisiana Constitutions. Defendant attaches an affidavit of an attorney who witnessed the electrocution of John Louis Evans in Alabama on April 22, 1983, which paints a vivid and gruesome picture of what occurs. It took three charges of electricity to kill Evans and an elapsed time of fourteen minutes.

However, electrocution has been held by courts of various jurisdictions not to be cruel and unusual punishment. See Annotation, 30 ALR 1452. Defendant notes in brief that the United States Supreme Court has never directly confronted the issue of cruelty and the methods of imposing capital punishment. Defendant therefore utilizes law review articles to support his contentions. In Wilkerson v. Utah, 99 U.S. 130 (1879), the High Court, did, however, uphold execution of death sentences by shooting as not being cruel and unusual. In State ex rel. Pierre v. Jones, 200 La. 808 at 823, 9 So.2d 42 at 50 U.S. cert den. 317 U.S. 633, 63 S.Ct. 64, 87 L.Ed. 510, (1942),[17] this Court declared that the infliction of death by electrocution was "more humane and less painful than by hanging...."

Without scientific or legal support, defendant makes the claim that lethal injection is significantly less severe and equally adequate to achieve the punishment to be inflicted. Thus, defendant contends that Louisiana's choice of electrocution is nothing more than the needless infliction of needless suffering. The brief concludes that since there exists the more humane method of lethal injection, electrocution is an antiquated form of torture.

Without any medical scientific or legal support for this proposition, these assignments of error lack merit.

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[17]The thrust of Jones was whether the amendment to La. R.S. 15:569 in 1940 could be considered an ex post facto law.

APPENDIX "B"

Supreme Court of Louisiana

NEW ORLEANS, 70112

FOR IMMEDIATE NEWS RELEASE NEWS RELEASE # 101

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 14th day of September, 1984, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARINGS DENIED:

83-KA-0619	State v. John F. Fuller
83-KA-1735	State v. Jimmy L. Glass See Per Curiam
83-KA-2549	State v. Peter Imbornone and Dominick Imbornone
83-KA-0718	State v. Joseph Jackson
83-C-2628	Raymond Johnson v. Insurance Company of North America, et al BLANCHE & LEMMON, J.J., would grant a rehearing.
84-C-0039	Danny A. Dauzat v. Gregory & Cook, Inc., et al MARCUS & BLANCHE, J.J., would grant a rehearing relative to penalties and attorney's fees.
84-CC-0084	Louise Miles Thibodeaux v. Kidearn Thibodeaux LEMMON, J., would grant a rehearing.

SEP 14 1984

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

VERSUS NO. 83-KA-1735

JIMMY L. GLASS

On Application for Rehearing

PER CURIAM

87C

As noted in our original opinion the sentence review memorandum by the state incorrectly listed the first degree murder prosecutions in the Twenty-Sixth Judicial District, the original venue of the case. Pursuant to our rule, the memorandum should have noted the first degree murder prosecutions in the Fifteenth Judicial District, the district in which the case was tried and the sentence imposed.

Defendant in his application for rehearing claimed that this Court's review of Fifteenth Judicial District Court capital prosecutions, following a state sentence review memorandum which did not address those prosecutions deprived him of a meaningful opportunity to address proportionality as relates to the appropriate other capital cases.

Responding to that complaint and pending consideration of relator's rehearing application we directed the state to file an appropriate supplemental sentence review memorandum and invited a defense response. Those documents have now been filed.

Relator's application for rehearing is without merit and is herewith denied.

OPPOSITION BRIEF

ORIGINAL

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

NO. 84,6030 (4)

JIMMY L. GLASS
Petitioner

VERSUS

STATE OF LOUISIANA
Respondent

ANSWER TO WRIT OF CERTIORARI

HENRY N. BROWN, JR.
District Attorney
26th Judicial District
Webster Parish, Louisiana
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

NO. 84,6030

JIMMY L. GLASS,
Petitioner

VERSUS

STATE OF LOUISIANA,
Respondent

ANSWER TO WRIT OF CERTIORARI

NOW COMES the State of Louisiana, through the undersigned District Attorney for the 26th Judicial Dist ict, who respectfully answers the Petition for Writ of Certiorari as follows:

1.
PROCEDURAL SUMMARY

The murders of Newton and Erline Brown occurred at approximately 1:51 a.m., December 25, 1982, in Webster Parish, Louisiana. The defendant, Jimmy L. Glass, was arrested in San Diego, California, on January 6, 1983, and re-tur.ed to Louisiana.

On January 10, 1983, petitioner was indicted, with Jimmy Wingo, for two counts of first degree murder. After petitioner was appointed an attorney, he was arraigned on January 21, 1983, and pled not guilty.

Petitioner filed a motion to sever his case from Jimmy Wingo and, after a hearing, the motion was granted. Additionally, petitioner filed a motion to change venue which was heard and granted on February 18, 1983. Petitioner's case was tr.nsferred to Lafayette Parish, 15th Judicial District Court, and a trial date of March 21 was set. Following numerous motions, the trial date was upset and a new date set for April 4, 1983.

On April 4, 1983, the trial of Jimmy Glass started and eventually resulted in a verdict of guilty of two counts of first degree murder with the recommendation that petitioner receive the death penalty on both counts.

On April 29, 1983, in accordance with the finding and recommendations of the jury, the court sentenced the defendant to death on both counts. The defendant appealed the conviction to the Louisiana Supreme Court, which rendered a decision affirming the conviction and sentence on May 14, 1984. A rehearing was applied for and, on September 14, 1984, the Louisiana Supreme Court denied the application for rehearing.

Defendant has filed this petition for writ of certiorari from the decision of the Louisiana Supreme Court.

2. STATEMENT OF FACTS

The summary of facts presented in the brief for petitioner is in part misleading and inaccurate. Many arguments in petitioner's writ are based on their fictional view of the evidence. Many arguments by petitioner have no validity when based on the actual evidence presented at the trial.

On Christmas Eve, 1982, petitioner, Jimmy L. Glass, was in the Webster Parish Jail in Minden, Louisiana. Petitioner had pled guilty to the crime of armed robbery and received a sentence of ten (10) years at hard labor. Petitioner was in a cell with several people, including Jimmy Wingo. On Christmas Eve at approximately 7:30 p.m., Jimmy Wingo was allowed out of his cell to make a Christmas phone call. While Wingo was making his call, petitioner requested to be allowed to make a Christmas phone call. Petitioner was allowed out of his cell and joined Wingo by the telephone. On duty in the jail

at this time was a radio operator,who was just steps from the telephone, and a jailer. The jailer's attention was distracted to a disturbance in the jail block and both petitioner and Wingo escaped by entering the jail elevator. The jailer attempted to beat the escaped prisoners to the bottom floor but was too late.

Petitioner and Wingo fled the Webster Parish Courthouse to a railroad track in downtown Minden and followed the railroad track to Dixie Inn. Dixie Inn is approximately three miles from Minden. In route to Dixie Inn, petitioner took the shirt of Wingo to cover the many tatoos on his arms. The victims were Newton and Erline Brown. The Browns lived on the outskirts of Dixie Inn next to the offices of their construction business. The Browns had spent Christmas Eve at home with their children and grandchildren. The Browns left their home on Christmas Eve at approximately 8:30 to visit a friend on Lake Bistineau. The friend, Doris Perkins, testified that the Browns arrived at her home at approximately 9:00 p.m. and left at 11:00 p.m.. Mrs. Perkins further testified that the distance from the lake to the Brown's home in Dixie Inn was approximately eighteen (18) miles. When petitioner and Wingo arrived at the Browns' home, petitioner attempted to break into the house and took a screen off the back window. Petitioner later cut the telephone wires to the house and, along with Wingo, found some beer and champagne. Petitioner and Wingo drank the beer in a secluded area behind the house. The Browns arrived home around 11:30 p.m. and prepared themselves for bed.

Petitioner and Wingo approached the house and petitioner threw a large rock through the kitchen glass door. Petitioner and Wingo entered the house and rushed to the bedroom. The Browns were found in bed and told to roll on their stomach, where they were tied hand and foot and gagged. Petitioner and Wingo then began to search the house for money and items of value. A clock was found where it had been thrown to the floor and unplugged. The clock showed the time to be 1:51 a.m.. Petitioner found some .38 shells and asked the victim, Newton Brown, for the location of the weapon. Petitioner learned the weapon was in the top of the bedroom closet and petitioner cut his hand on a pruning saw as he looked for the weapon. Petitioner's blood was left on the wall of this bedroom closet. Additionally, petitioner's fingerprint was found on the pruning saw. Petitioner found the .38 Smith & Wesson revolver in the closet.

Petitioner crawled into the bed between Mr. and Mrs. Brown. Petitioner placed the .38 to the back of Mr. Brown's head and shot him. Petitioner then placed the weapon to the back of Mrs. Brown's head and shot her. The Browns were lying side by side in the bed and were both shot at an angle from the middle of the bed by a gun placed to their head. The only way the victims could have been shot and killed was if Jimmy Glass had crawled into bed between the two.

Following the shooting, petitioner and Wingo left in the automobile owned by the Browns. Petitioner and Wingo split $1800.00 in cash, some coins and other items taken from the house. Petitioner kept the 30/30 rifle and the .38 Smith & Wesson murder weapon. Wingo kept the shotgun. Petitioner and Wingo fled in the vehicle owned by the victims to Wingo's sister's home just outside of Vivian, Louisiana. (The home was actually located in Vivian, Texas, just across the line from Louisiana.) While at Wingo's sister's home, petitioner kept possession of the .38 Smith & Wesson, which was loaded. Petitioner and Wingo had something to eat and then left with Wingo's girlfriend, Gwen Hill. Petitioner left Wingo and his girlfriend in Atlanta, Texas, and drove to Little Rock, Arkansas, where he "partied". Petitioner asked a friend to sell the weapons for him and eventually went to California, where he was

arrested at the San Deigo airport and returned to Louisiana to face these charges.

3. ISSUES

A. Petitioner claims that the jury relied on aggravating circumstances that were not supported by the evidence and/or were elements of the crime of first degree murder.

In the instant case, the jury found the following aggravating circumstances. (1) Offender engaged in the perpetration of aggravated burglary; (2) offender knowingly created risk of death to more than one person; (3) offense was committed in an especially heinous, atrocious and cruel manner; (4) the offender at the time of the offense was imprisoned after sentence for a commission of an unrelated forcible felony. Petitioner contends that there was no evidence to support two of the four aggravating circumstances found by the jury.

Petitioner's contention is not well founded. The evidence clearly supports that petitioner was incarcerated at the time of the offense for an unrelated forcible felony and that the crimes were committed in an especially heinous, atrocious and cruel manner. However, no doubt exists that the jury was correct in finding that the petitioner was engaged in the perpetration of an aggravated burglary and that he did knowingly create a risk of death to more than one person. This situation has been ruled upon by this Honorable Court in Zant v. Stephens, 103 Sup.Ct. 2733 1983.

B. Petitioner claims that an illegal search and seizure of the contents of a letter was obtained.

The petitioner objects to the denial by the trial court of his motion to suppress a letter written by petitioner. The trial court was correct in denying the motion to suppress following a pre-trial hearing. However, at the trial the State never offered the letter into evidence nor questioned any law enforcement officer concerning the letter. Therefore, the issue of the correctness of the trial court's decision in denying the motion to suppress is not before the Court.

The defense called the mother of petitioner during its case in chief. A short cross-examination followed the mother's direct testimony. At the conclusion of the cross-examination, the mother was asked if her son made a statement to her indicating he knew he was going to die for what he had done. The mother responded affirmatively and was tendered for redirect examination. No objection was made by defense counsel and on redirect examination the mother was asked to read a letter received from the defendant. The contents of the letter, which the defense had sought to suppress at a pre-trial hearing, was read to the jury by the witness at the request of the defense attorney. The defense attorney then moved and entered the letter into evidence. At no time did the prosecution refer to the letter or offer it into evidence.

Petitioner was arrested in San Deigo, California, and was escorted back to Louisiana by Louisiana authorities, Detective Flowers and Deputy Haynes. At the San Deigo County Jail, defendant was given his rights under Miranda and he executed a standard Louisiana State Police waiver form. No question exists that the defendant was properly warned of his rights including information that he was facing the death penalty. Detective Flowers testified that he read the petitioner's rights to him, explained them to petitioner and checked them off the waiver form. This was all recorded. Petitioner indicated to the detective and in court that he knew and understood his rights.

After boarding the plane for the trip back to Louisiana, petitioner asked to write a letter. The officers had informed petitioner that there was

a good chance he would get the death penalty for his crime. After the plane took off, petitioner was given a notebook and pen and wrote a letter to his mother. Upon finishing the letter, petitio er asked Detective Flowers if he wanted or needed to read it. Detective Flowers answered that he did not have to read the letter. Defendant tore the letter from the pad, folded it and wrote "Caroline Glass from Jimmy" and gave it to Detective Flowers, who handed it to Deputy Haynes, who placed it in his coat pocket. Deputy Haynes made a photocopy of the letter and delivered it to Glass' mother.

Petitioner asked Detective Flowers if the detective wanted to read the letter, which he merely folded over and gave to the officers for delivery to his mother. Under the circumstances, the trial court was correct in concluding that petitioner had no expectation of privacy in the contents of the letter. Thus petitioner has no legitimate claim to Fourth Amendment protection and the ruling of the trial court in refusing to grant the motion to suppress was correct.

However, it is again pointed out that this letter was not offered into evidence nor used by the State of Louisiana. The letter was used by the defense in examining a defense witness and was offered by the defense.

C. Petitioner claims that the death penalty violates the equal protection clause of the Fourteenth Amendment to the US Constitution and the method of execution employed by Louisiana violates the Eighth Amendment to the US Constitution as it causes unnecessary pain and suffering.

The arguments of petitioner concerning the death penalty in Louisiana are without merit and have been previously ruled on by this Court.

4. CONCLUSION

Petitioner committed the type of crime that cannot be tolerated in our society. The evidence clearly demonstrated the guilt of petitioner and that he deserves the penalty imposed by a jury. Petitioner's case was tried in accordance with due process and this application for writs of certiorari should be denied.

Respectfully submitted,

HENRY N. BROWN, JR.
District Attorney
26th Judicial District
P. O. Box 758
Minden, Louisiana 71058-0758

CERTIFICATE

I hereby certify that a copy of the above and foregoing Answer to Writ of Certiorari has been forwarded this date to Mr. Maurice Loridans, Counsel for Petitioner, P. O. Box 5089, Bossier City, Louisiana 71171-5089, and to Glenn F. Armstrong, Counsel for Petitioner, 822 Benton Road, Bossier City, Louisiana 71111, by depositing same in the United States Mail with proper postage affixed thereto for delivery.

Minden, Louisiana, this 18th day of January, 1985.

OF COUNSEL

OPINION

SUPREME COURT OF THE UNITED STATES

JIMMY L. GLASS *v.* LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 84-6330. Decided April 29, 1985

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting from denial of certiorari.

The petitioner Jimmy L. Glass has been condemned to death by electrocution—"that is, causing to pass through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person convicted until such person is dead." La. Rev. Stat. Ann. § 15:569 (1981). Glass contends that "electrocution causes the gratuitous infliction of unnecessary pain and suffering and does not comport with evolving standards of human dignity," and that this method of officially sponsored execution therefore violates the Eighth and Fourteenth Amendments. Petition for Certiorari 27. The Supreme Court of Louisiana held that this claim must summarily be rejected pursuant to "clearly established principles of law" and observed that, in any event, the claim is wholly lacking in medical or scientific merit. App. to Pet. for Cert. 1–2, 26.

I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), and would therefore grant certiorari and vacate Glass' death sentence in any event. One of the reasons I adhere to this view is my belief that the "physical and mental suffering" inherent in *any* method of execution is so "uniquely degrading to human dignity" that, when combined with the arbitrariness by which

capital punishment is imposed, the trend of enlightened opinion, and the availability of less severe penological alternatives, the death penalty is always unconstitutional. *Furman v. Georgia*, 408 U. S. 238, 287–291 (1972).

Even if I thought otherwise, however, I would vote to grant certiorari. Glass' petition presents an important and unsettling question that cuts to the very heart of the Eighth Amendment's Cruel and Unusual Punishments Clause[1]—a question that demands measured judicial consideration. Electrocution is today the predominant means by which States carry out the death penalty.[2] Since the Court's decision in *Gregg v. Georgia*, *supra*, an ever-increasing number of condemned prisoners have contended that electrocution is a cruel and barbaric method of extinguishing human life, both *per se* and as compared with other available means of execution. As in this case, such claims have uniformly and summarily been rejected,[3] typically on the strength of this

[1]The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*." (Emphasis added.)

[2]See The Death Penalty in America 16 (H. Bedau 3d ed. 1982) (hereinafter Bedau); Gardner, Executions and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment, 39 Ohio St. L. J. 96, 119, and n. 164 (1978).

[3]See, *e. g.*, *Sullivan v. Dugger*, 721 F. 2d 719, 720 (CA11 1983) (order); *Spinkellink v. Wainwright*, 578 F. 2d 582, 616 (CA5 1978), cert. denied, 440 U. S. 976 (1979); *Diaz v. Newsome*, 584 F. Supp. 1052, 1068 (ND Ga. 1984); *Mitchell v. Hopper*, 538 F. Supp. 77, 94 (SD Ga. 1982), supp. op., 538 F. Supp. 105, aff'd in part and rev'd in part, 716 F. 2d 1529 (CA11), vacated *sub nom. Spencer v. Zant*, 715 F. 2d 1562 (CA11 1983); *McCorquodale v. Balkcom*, 525 F. Supp. 408, 430–431 (ND Ga. 1981), aff'd in part and rev'd in part, 705 F. 2d 1553 (CA11), on rehearing, 721 F. 2d 1498 (1983), cert. denied, —— U. S. —— (1984); *Ruiz v. State*, 265 Ark. 975, 900–901, 582 S. W. 2d 915, 927–928 (1979), cert. denied, 454 U. S. 1098 (1981); *Booker v. State*, 397 So. 2d 910, 918 (Fla.), cert. denied, 454 U. S. 967 (1981); *Godfrey v. Francis*, 251 Ga. 652, 670, 308 S. E. 2d 806, 820, cert. denied, —— U. S. —— (1983); *State v. Shaw*, 273 S. C. 194, 206, 255 S. E. 2d 799, 804–806, cert. denied, 444 U. S. 967 (1979); *Martin v. Commonwealth*, 221 Va. 436, 439, 271 S. E. 2d 123, 125 (1980).

Court's opinion in *In re Kemmler*, 136 U. S. 436 (1890), which authorized the State of New York to proceed with the first electrocution 95 years ago. *Kemmler*, however, was grounded on a number of constitutional premises that have long since been rejected and on factual assumptions that appear not to have withstood the test of experience. I believe the time has come to measure electrocution against well-established contemporary Eighth Amendment principles.

I

Electrocution as a means of killing criminals was first authorized by the New York Legislature in 1888, and resulted from a lengthy investigation to identify "the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases."[4] In *In re Kemmler*, *supra*, this Court rejected a constitutional attack on New York's statute by William Kemmler, who was scheduled to be the first person put to death by electrocution. The Court emphasized that, because the Eighth Amendment was not applicable to the States, "[t]he decision of the state courts sustaining the validity of the act under the state constitution is not reexaminable here." 136 U. S., at 447.[5] In dicta, the Court also followed a "historical" interpretation of the Cruel and Unusual Punishments Clause as it governed

[4]See Report of the Commission to Investigate and Report the Most Humane and Practical Method of Carrying Into Effect the Sentence of Death in Capital Cases, at 3 (Transmitted to the Legislature of the State of New York, Jan. 17, 1888) (hereinafter Commission Report). See generally Bedau 15; L. Lawes, Life and Death in Sing Sing 183–186 (1928) (hereinafter Lawes); N. Teeters, Hang By The Neck 446 (1967) (hereinafter Teeters); Beichman, The First Electrocution, 5 Commentary 410, 411 (1963). Some contemporary observers described the so-called Electrical Execution Law as a means to ensure "euthanasia by electricity." *Id.*, at 411.

[5]The Court concluded that the challenged statute was reviewable only to determine whether its enactment "was in itself within the legitimate sphere of the legislative power of the State, and in the observance of those general rules prescribed by our systems of jurisprudence." 136 U. S., at 449. See also *McElvaine v. Brush*, 142 U. S. 155, 158–159 (1891).

executions carried out by the Federal Government, suggesting that the constitutionality of a particular means of execution should be determined by reference to contemporary norms at the time the Bill of Rights was adopted. See id., at 446–447. In addition, the Court approvingly observed that the State court had concluded that "'it is within easy reach of electrical science at this day to so generate and apply to the person of the convict a current of electricity of such known and sufficient force as *certainly* to produce *instantaneous*, and, therefore, *painless*, death.'" *Id.*, at 443 (emphasis added).

State and federal courts recurrently cite to *Kemmler* as having conclusively resolved that electrocution is a constitutional method of extinguishing life, and accordingly that further factual and legal consideration of the issue is unnecessary. See n. 3, *supra*. But *Kemmler* clearly is antiquated authority. It is now well-established that the Eighth Amendment applies to the States through the Fourteenth Amendment. See, *e. g.*, *Gregg* v. *Georgia*, 428 U. S. 153, 168 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); *Robinson* v. *California*, 370 U. S. 660 (1962). Moreover, the Court long ago rejected *Kemmler's* "historical" interpretation of the Cruel and Unusual Punishments Clause, emphasizing instead that the prohibitions of the Clause are not "confine[d] . . . to such penalties and punishment as were inflicted by the Stuarts." *Weems* v. *United States*, 217 U. S. 349, 372 (1910). This is because "[t]ime works changes, [and] brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." *Id.*, at 373. The Clause thus has an "expansive and vital character," id., at 377, that "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion).[6] Accordingly, Eighth Amendment claims must be evaluated "in the light of contemporary human knowledge," *Robinson* v. *California*, *supra*, at 666, rather than in reliance on century-old factual premises that may no longer be accurate.

To be sure, legislative decisions concerning appropriate forms of punishment are entitled to considerable deference. But in common with all constitutional guarantees, "it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power." *Gregg* v. *Georgia*, *supra*, at 174, n. 19 (opinion of Stewart, POWELL, and STEVENS, JJ.); see also *Weems* v. *United States*, *supra*, at 371–373.[7] "[T]he Constitution contemplates that in the end [a court's] own judgment will be brought to bear on the question of the acceptability" of a challenged punishment, guided by "objective factors to the maximum possible extent." *Coker* v. *Georgia*, 433 U. S. 584, 592, 597 (1977) (plurality opinion). Thus it is firmly within the "historic process of constitutional adjudication" for courts to consider, through a "discriminating evaluation" of all available evidence, whether a particular means of carrying out the death penalty is "barbaric" and unnecessary in light of currently available alternatives. *Furman* v. *Georgia*, 408 U. S., at 420, 430 (POWELL, J., dissenting).

What are the objective factors by which courts should evaluate the constitutionality of a challenged method of punish-

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[6] See also *Estelle* v. *Gamble*, 429 U. S. 97, 102 (1976) (methods of punishment cannot trangress contemporary "'broad and idealistic concepts of dignity, civilized standards, humanity, and decency'").

[7] Were it otherwise, the Cruel and Unusual Punishments Clause would be rendered "little more than good advice," *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion), and "[i]ts general principles would have little value and be converted by precedent into impotent and lifeless formulas," *Weems* v. *United States*, 217 U. S. 349, 373 (1910).

ment? First and foremost, the Eighth Amendment prohibits "the unnecessary and wanton infliction of pain." *Gregg* v. *Georgia*, *supra*, at 173 (opinion of Stewart, POWELL, and STEVENS, JJ.). See also *Coker* v. *Georgia*, *supra*, at 593 (plurality opinion) (a punishment is excessive if it is "nothing more than the purposeless and needless imposition of pain and suffering"); *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 463 (1947) ("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence"). The Court has *never* accepted the proposition that notions of deterrence or retribution might legitimately be served through the infliction of pain beyond that which is minimally necessary to terminate an individual's life.[8] Thus in explaining the obvious unconstitutionality of such ancient practices as disembowelling while alive, drawing and quartering, public dissection, burning alive at the stake, crucifixion, and breaking at the wheel, the Court has emphasized that the Eighth Amendment forbids "inhuman and barbarous" methods of execution that go at all beyond "the mere extinguishment of life" and cause "torture or a lingering death." *In re Kemmler*, 136 U. S., at 447. It is beyond debate that the Amendment proscribes all forms of "unnecessary cruelty" that cause gratuitous "terror, pain, or disgrace." *Wilkerson* v. *Utah*, 99 U. S. 130, 135–136 (1878).[9]

[8] See, *e. g.*, *Furman* v. *Georgia*, 408 U. S. 238, 392 (1972) (BURGER, C. J., dissenting) ("The dominant theme of the Eighth Amendment debates was that the ends of the criminal laws cannot justify the use of measures of extreme cruelty to achieve them").

[9] See also *id.*, at 279 (BRENNAN, J., concurring); *id.*, at 430 (POWELL, J., dissenting) ("no court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives"); *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 473–474 (1947) (Burton, J., dissenting) ("Taking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man. It should not be possible under the constitutional procedure of a self-governing people. . . . The all-important consideration is that the

The Eighth Amendment's protection of "the dignity of man," *Trop* v. *Dulles*, *supra*, at 100 (plurality opinion), extends beyond prohibiting the unnecessary infliction of pain when extinguishing life. Civilized standards, for example, require a minimization of physical violence during execution irrespective of the pain that such violence might inflict on the condemned. See, *e. g.*, Royal Commission on Capital Punishment, 1949–1953 Report ¶732, at 255 (1953) (hereinafter Royal Commission Report). Similarly, basic notions of human dignity command that the State minimize "mutilation" and "distortion" of the condemned prisoner's body. *Ibid.* These principles explain the Eighth Amendment's prohibition of such barbaric practices as drawing and quartering. See, *e. g.*, *Wilkerson* v. *Utah*, *supra*, at 135.

In evaluating the constitutionality of a challenged method of capital punishment, courts must determine whether the factors discussed above—unnecessary pain, violence, and mutilation—are "*inherent* in the method of punishment." *Louisiana ex rel. Francis* v. *Resweber*, *supra*, at 464 (emphasis added). A single, unforeseeable accident in carrying out an execution does not establish that the method of execution itself is unconstitutional. Cf. *Estelle* v. *Gamble*, 429 U. S. 97, 105 (1976). Thus in *Louisiana ex rel. Francis* v. *Resweber*, *supra*, the Court allowed a State to proceed with a second effort to electrocute a prisoner after a mechanical failure had interrupted the first attempt.[10] The Court emphasized that the initial failure had been an "unforeseeable

execut... shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself").

[10] The issue in *Resweber* was whether repeated attempts to electrocute a person were unconstitutional, not whether electrocution was *per se* cruel and unusual punishment. The plurality obviously believed that electrocution in the abstract was not constitutionally forbidden, and even the dissent assumed that electrocution generally was so "instantaneous" and "painless" that it would not present constitutional difficulties. *Id.*, at 474 (Burton, J., dissenting).

accident," 329 U. S., at 464, and Justice Frankfurter's concurrence stressed that the failure had been an "innocent misadventure," *id.*, at 470.

A different case would be presented, however, if the Court were confronted with "a series of abortive attempts." *Id.*, at 471. This is because the Eighth Amendment requires that, as much as humanly possible, a chosen method of execution minimize the risk of unnecessary pain, violence, and mutilation.[11] If a method of execution does not satisfy this criteria—if it causes "torture or a lingering death" in a significant number of cases, *In re Kemmler*, *supra*, at 447—then unnecessary cruelty inheres in that method of execution and the method violates the Cruel and Unusual Punishments Clause.

II

Because contemporary courts have summarily rejected constitutional challenges to electrocution, the evidence respecting this method of killing people has not been tested through the adversarial truthfinding process. There is considerable empirical evidence and eyewitness testimony, however, which if correct would appear to demonstrate that electrocution violates every one of the principles set forth above.[12] This evidence suggests that death by electrical

[11] We have emphasized in procedural contexts that the Eighth Amendment requires that all feasible measures be taken to minimize the risk of mistakes in administering capital punishment. See, *e. g.*, *Zant* v. *Stephens*, 462 U. S. ——, —— (1983); *Eddings* v. *Oklahoma*, 455 U. S. 104, 118 (1982) (O'CONNOR, J., concurring). See also Royal Commission Report ¶ 729, at 255 (importance of determining "which method [of execution] is most likely to avoid mishaps").

[12] Details concerning the actual process of electrocution are not widely known, primarily because "executions are carried out in private; there are few witnesses; pictures are not allowed; and newspaper accounts are, because of 'family newspaper' requirements of taste, sparing in detail." Hearings on H. R. 8414 et al. before Subcommittee No. 3 of the House Committee on the Judiciary, 92d Cong., 2d Sess., 308 (1972) (hereinafter 1972 Hearings). See also *Furman* v. *Georgia*, 408 U. S., at 297 (BRENNAN, J., concurring); Camus, Reflections on the Guillotine, in Resistance, Rebellion and Death 141 (1960) ("The man who enjoys his coffee while reading that justice has been done would spit it out at the least detail").

current is extremely violent and inflicts pain and indignities far beyond the "mere extinguishment of life." *Ibid.*[13] Witnesses routinely report that, when the switch is thrown, the condemned prisoner "cringes," "leaps," and "'fights the straps with amazing strength.'"[14] "The hands turn red, then white, and the cords of the neck stand out like steel bands."[15] The prisoner's limbs, fingers, toes, and face are severely contorted.[16] The force of the electrical current is so powerful[17] that the prisoner's eyeballs sometimes pop out and "rest on [his] cheeks."[18] The prisoner often defecates, urinates, and

[13] The technical aspects of electrocution, briefly stated, are that the authorities bind the condemned to a wooden chair with leather straps, affix electrodes to his shaven head and right leg, and partially cover his face with a mask. When the switch is thrown, an "initial voltage of 2,000 to 2,200 and amperage of 7 to 12" are sent "hurtling through the prisoner's body," and the voltage and amperage subsequently "are lowered and reapplied at various intervals" until the prisoner is dead. Lawes 170.

[14] Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., 20 (hereinafter 1968 Hearings) (statement of Clinton Duffy, former Warden of San Quentin); Lawes 170; 1972 Hearings, at 305. See also Teeters 448 ("'The figure in the chair gives one terrific lurch against the straps, every muscle contracting and straining. The face—all that can be seen from mouth to throat—turns crimson'") (quoting Dr. Amos Squire, Sing Sing prison).

[15] Lawes 170.

[16] C. Duff, A Handbook on Hanging 119–120 (1974) (hereinafter Duff).

[17] "The force of the death-dealing blow the condemned prisoner receives is more easily understood when it is realized that this amount of electricity, transferred into mechanical power, would be equivalent to 884,400 foot-pounds per minute, or enough electrical energy to light 800 lights in the average home." Lawes 189.

[18] 1968 Hearings, at 20 (statement of Clinton Duffy); see also Rubin, The Supreme Court and the Death Penalty, 15 Crime and Delinquency 128, 129 (1969). In addition, the force of the current is so strong that it sometimes literally ruptures the prisoner's heart. Duff 120.

vomits blood and drool."[9]

"The body turns bright red as its temperature rises," and the prisoner's "flesh swells and his skin stretches to the point of breaking."[10] Sometimes the prisoner catches on fire, particularly "if [he] perspires excessively."[11] Witnesses hear a loud and sustained sound "like bacon frying," and "the sickly sweet smell of burning flesh" permeates the chamber.[12] This "smell of frying human flesh in the immediate neighbourhood of the chair is sometimes bad enough to nauseate even the Press representatives who are present."[13] In the meantime, the prisoner almost literally boils: "the temperature in the brain itself approaches the boiling point of water," and when the post-electrocution autopsy is performed "the liver is so hot that doctors have said that it cannot be touched by the human hand."[14] The body frequently is badly burned and disfigured.[15]

The violence of killing prisoners through electrical current is frequently explained away by the assumption that death in these circumstances is instantaneous and painless.[16] This assumption, however, in fact "is open to serious question" and is "a matter of sharp conflict of expert opinion."[17] Throughout the 20th century a number of distinguished electrical scientists and medical doctors have argued that the available evidence strongly suggests that electrocution causes unspeakable pain and suffering. Because "[t]he current flows along a restricted path into the body, and destroys all the tissue confronted in the path . . . [i]n the meantime the vital organs may be preserved; and pain, too great for us to imagine, is induced. . . . For the sufferer, time stands still; and this excruciating torture seems to last for an eternity."[18] L. G. V. Rota, a renowned French electrical scientist, concluded after extensive research that

> "[i]n every case of electrocution, . . . death inevitably supervenes but it may be very long, and above all, excruciatingly painful . . . . [T]he space of time before death supervenes varies according to the subject. Some have a greater physiological resistance than others. I do not believe that anyone killed by electrocution dies instantly, no matter how weak the subject may be. In certain cases death will not have come about even though the point of contact of the electrode with the body shows distinct burns. Thus, in particular cases, the condemned person may be alive and even conscious for several minutes without it being possible for a doctor to say whether the victim is dead or not. . . . This method of execution is a form of torture."[19]

[9] Tyler, Electrocution As a Spectator Sport, 2 Fact 47, 50–51 (1965); see also 1968 Hearings, at 20 (statement of Clinton Duffy).

[10] Gardner, 39 Ohio St. L. J., *supra* n. 2, at 128; 1968 Hearings, at 20 (statement of Clinton Duffy). See also G. Bishop, Executions: The Legal Ways of Death 27 (1965).

[11] Rubin, 15 Crime and Delinquency, *supra* n. 18, at 128; see also 1972 Hearings, at 306; Teeters 448.

[12] Tyler, 2 Fact, *supra* n. 19, at 50. One veteran observer once commented: "Only the greenhorns sit in the first row. We sit behind. The smell is too bad." *Id.*, at 49. See generally 1968 Hearings, at 20 (statement of Clinton Duffy); Bedau 16; Teeters 449; Rubin, 15 Crime and Delinquency, *supra* n. 18, at 128.

[13] Duff 119.

[14] Lawes 189; 1968 Hearings, at 20 (statement of Clinton Duffy). "[T]he electrodes making contact may reach a temperature high enough to melt copper (1,940 degrees Fahrenheit) and . . . the average body temperature will be in the neighbourhood of 140 degrees Fahrenheit . . . ." Lawes 188.

[15] Bedau 16; 1968 Hearings, at 20 (statement of Clinton Duffy).

[16] Lawes 188–189; Teeters 447–448.

[17] 1972 Hearings, at 306; Note, The Death Penalty Cases, 56 Calif. L. Rev. 1268, 1339 (1968). "No one knows whether electrocuted individuals retain consciousness until dead . . . ." 1972 Hearings, at 306. See also Bedau, General Introduction, in Capital Punishment 1, 17–18, 22–23 (J. McCafferty ed. 1972); G. Scott, The History of Capital Punishment 219 (1960).

[18] Teeters 447 (quoting Nicola Tesla).

[19] Quoted in Duff 118–119. See also Lawes 187 ("[T]he resisting power of the human body is very high and it requires a voltage comparatively large or small, depending entirely upon the resistance and contacts, to

Although it is an open question whether and to what extent an individual feels pain upon electrocution, there can be no serious dispute that in numerous cases death is far from instantaneous. Whether because of shoddy technology and poorly trained personnel, or because of the inherent differences in the "physiological resistance" of condemned prisoners to electrical current, see n. 29, *supra*, it is an inescapable fact that the 95-year history of electrocution in this country has been characterized by repeated failures swiftly to execute and the resulting need to send recurrent charges into condemned prisoners to ensure their deaths.* The very first electrocution required multiple attempts before death resulted,* and our cultural lore is filled with examples of attempted electrocutions that had to be restaged when it was discovered that the condemned "tenaciously clung to life."*

force this amount of current through a circuit in which the body, with its contacts, constitutes the resistance").

*See Duff 122 ("Experience proves that human beings vary enormously in their powers of resistance to electrocution, which depends upon the strength of current and not upon voltage pressure: hence, *several shocks* may be required to produce what medical experts can reasonably define as death, which means that doctors have to stand by with stethoscopes at the ready to apply to the victim's chest when he or she has been *given one or more doses of current*") (emphasis in original).

*See generally Teeters 446–447; Beichman, 5 Commentary, *supra* n. 4, at 417–419. George Westinghouse, founder of Westinghouse Electric Company, "thought that the job could have been 'done better with an axe.'" Voices Against Death xxxii (P. Mackey ed. 1976) (hereinafter Voices Against Death). The New York *Press* asserted that "the age of burning at the stake is past; the age of burning at the wire will pass also." Beichman, *supra*, at 417. Another newspaper editorialized: "[I]t is not improbable that the first will prove the last . . . . Dr. E. A. Spitzka, the celebrated expert, who was present, unhesitatingly pronounced the experiment a failure and declared it his belief that the law should be repealed and no more experiments made with electricity as a means of execution." Teeters 446–447. A note in the *Harvard Law Review* from the time suggested that the judicial approval of electrocution "might well be changed in the light of subsequent experiment." 4 Harv. L. Rev. 29[illegible].

*R. Elliott, Agent of Death 96 (1940) (hereinafter Elliott). See generally Bedau 15; Duff 121; J. Pritchard, A History of Capital Punishment 68

Attending physicians routinely acknowledge that electrocutions must often be repeated in order to ensure death.* It is difficult to imagine how such procedures constitute anything

(1962); Teeters 448–449; Gardner, 39 Ohio St. L. J., *supra* n. 2, at 126; 1972 Hearings, at 305–306. Robert Elliott, Sing Sing's long-time electrocutioner, described in his memoirs a number of failed attempts to electrocute prisoners. See especially Elliott 57 ("Fred's heart, larger than that of any other person electrocuted up to that time, was still beating, and he was alive. There was only one thing to do: put him in the chair again, and pass current through his body until he was dead"); *id.*, at 66 (describing the execution of another condemned prisoner in which "six shocks [were] necessary before he was pronounced dead"); *id.*, at 147–148.

A noted instance of this phenomenon occurred when Ethel Rosenburg was electrocuted for treason: five consecutive attempts were required before she finally died. "After the *fourth* (shock) guards removed one of the two straps and the two doctors applied their stethoscopes. But they were not satisfied that she was dead. The executioner came to them from his switchboard in a small room 10 feet from the chair. 'Want another?' he asked. The doctors nodded. Guards replaced the straps and for the *fifth* time electricity was applied." Duff 122 (emphasis in original).

See also Howells, State Manslaughter, in Voices Against Death 152:

"It was not imagined that electricity could fail to kill instantly, much less that the criminal, who had become the State's peculiar care, could be so ineffectually tortured as to froth at the mouth, and strain at his bonds with writhings of agony which almost burst them, or give out the smell of his burning flesh so that the invited guest was often made sick at his stomach by the loathsome and atrocious fact. Yet all this has happened again and again in the execution of the death sentences since the consecration of the electric chair to the hallowed office of the axe, the noose, the screw. It has happened so often that I, at least, had become used to reading of it, and had tranquilly accepted it . . . . I generally managed to reconcile myself to the record of the frothing, and burning, and writhing, by learning further that the scientific gentleman, or the educated electrician, on the other side of the wall, had made it all right by discharging another thousand or two thousand volts into the body of his erring brother, and so putting him finally out of his misery."

*Dr. Amos Squires, for years the officiating doctor at electrocutions conducted at Sing Sing, observed that after "the current is cut off . . . the doctor with his stethoscope listens for heartbeats—*he listens to them grow fainter and fainter.* A brief interval passes. The switch is thrown again—and after contact is broken, again the doctor listens. *There is seldom any pulse this time.*" Teeters 448 (emphasis added). See also id., at

less than "death by installments"—"a form of torture [that] would rival that of burning at the stake." *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S., at 474, 476 (Burton, J., dissenting)."

This pattern of "death by installments" is by no means confined to bygone decades. Here is one eyewitness account of Alabama's electrocution of John Louis Evans on April 12, 1983:

> "At 8:30 p. m. the first jolt of 1900 volts of electricity passed through Mr. Evans' body. It lasted thirty seconds. Sparks and flames erupted from the electrode tied to Mr. Evans' left leg. His body slammed against the straps holding him in the electric chair and his fist clenched permanently. The electrode apparently burst from the strap holding it in place. A large puff of greyish smoke and sparks poured out from under the

449 ("[I]t often takes several shocks of high voltage to finally convince the attending physician—who often must rely on the executioner himself to give the nod—that the victim is actually dead").

" Louisiana's execution of Willie Francis remains the most notorious example of the botched manner in which so many electrocutions have been conducted. See generally L. Berkson, The Concept of Cruel and Unusual Punishment 28–29 (1975); B. Prettyman, Death and the Supreme Court 90–128 (1961). Sheriff Harold Resweber described the first attempted electrocution as follows:

"Then the electrocutioner turned on the [illegible] and when he did Willie Francis' lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: 'Take it off. Let me breath.'" 329 U. S., at 480, n. 2 (Burton, J., dissenting).

Another witness gave this account of the aborted attempt:

"... saw the electrocutioner turn on the switch and I saw his lips puff out and swell, his body tensed and stretched. I heard the one in charge yell to the man outside for more juice when he saw that Willie Francis was not dying and the one on the outside yelled back he was giving him all he had. Then Willie Francis cried out 'Take it off. Let me breath.' Then they took the hood from his eyes and unstrapped him. . . . This boy really got a shock when they turned that machine on." *Ibid.*

hood that covered Mr. Evans' face. An overpowering stench of burnt flesh and clothing began pervading the witness room. Two doctors examined Mr. Evans and declared that he was not dead.

"The electrode on the left leg was refastened. At 8:30 p. m. *[sic]* Mr. Evans was administered a second thirty second jolt of electricity. The stench of burning flesh was nauseating. More smoke emanated from his leg and head. Again, the doctors examined Mr. Evans. The doctors reported that his heart was still beating, and that he was still alive.

"At that time, I asked the prison commissioner, who was communicating on an open telephone line to Governor George Wallace to grant clemency on the grounds that Mr. Evans was being subjected to cruel and unusual punishment. The request for clemency was denied.

"At 8:40 p. m., a third charge of electricity, thirty seconds in duration, was passed through Mr. Evans' body. At 8:44, the doctors pronounced him dead. The execution of John Evans took fourteen minutes."*

Similarly, this was the scene at Georgia's electrocution of Alpha Otis Stephens just last December 12th:

> "The first charge of electricity administered today to Alpha Otis Stephens in Georgia's electric chair failed to kill him, and he struggled to breathe for eight minutes before a second charge carried out his death sentence for murdering a man who interrupted a burglary.
>
> . . . . . .
>
> ". . . A few seconds after a mask was placed over his head, the first charge was applied, causing his body to snap forward and his fists to clench.
>
> "His body slumped when the current stopped two minutes later, but shortly afterward witnesses saw him

* Affidavit of Russell F. Canan (June 22, 1983), attached to Pet. for Cert.

struggle to breathe. In the six minutes allowed for the body to cool before doctors could examine it, Mr. Stephens took about 23 breaths.

"At 12:26 A. M., two doctors examined him and said he was alive. A second two-minute charge was administered at 12:28 A. M."*

Stephens "'was just not a conductor' of electricity, a Georgia prison official said."*

Thus there is considerable evidence suggesting—at the very least—that death by electrocution causes far more than the "mere extinguishment of life." *In re Kemmler*, 136 U. S., at 447. This evidence, if correct, would raise a substantial question whether electrocution violates the Eighth Amendment in several respects. First, electrocution appears to inflict "unnecessary and wanton . . . pain" and cruelty, and to cause "torture or a lingering death" in at least a significant number of cases. *Gregg* v. *Georgia*, 433 U. S., at 173 (opinion of Stewart, POWELL, and STEVENS, JJ.); *In re Kemmler*, *supra*, at 447. Second, the physical violence and mutilation that accompany this method of execution would seem to violate the basic "dignity of man." *Trop* v. *Dulles*, 356 U. S., at 100 (plurality opinion). Finally, even if electrocution does not invariably produce pain and indignities, the apparent century-long pattern of "abortive attempts" and lingering deaths suggests that this method of execution carries an unconstitutionally high risk of causing such atrocities. *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S., at 471 (Frankfurter, J., concurring); see also n. 11, *supra*. These features of electrocution seem so "inherent in [this] method of execution" as to render it *per se* cruel and unusual punishment forbidden by the Eighth Amendment. *Louisiana ex rel. Francis* v. *Resweber*, *supra*, at 464.

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*N. Y. Times, Dec. 13, 1984, p. A18, cols. 1–4.
*N. Y. Times, Dec. 17, 1984, p. A22, col. 1.

Moreover, commentators and medical experts have urged that other currently available means of execution—particularly some forms of lethal gas and fast-acting barbituates—accomplish the purpose of extinguishing life in a surer, swifter, less violent, and more humane manner.* Several state legislatures have abandoned electrocution in favor of lethal injection for these very reasons; one of the architects of this change has emphasized that it resulted precisely from the recognition that the electric chair is "a barbaric torture device" and electrocution a "gruesome ritual."* Other states have rejected electrocution in favor of the use of lethal gas.*

For me, arguments about the "humanity" and "dignity" of any method of officially sponsored executions are a constitutional contradiction in terms. See *supra*, at ——. Moreover, there is significant evidence that executions by lethal gas—at least as administered in the gas chamber*—and barbituates—at least as administered through lethal injections*—carry their own risks of pain, indignity, and prolonged suffering. But having concluded that the death penalty in the abstract is consistent with the "evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles*, 356 U. S., at 101 (plurality opinion), courts cannot now avoid the Eighth Amendment's proscription of "the unnecessary and wanton infliction of pain" in carrying out that penalty simply by relying on 19th-century precedents that

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*See Bedau 18; Gardner, 39 Ohio St. L. J., *supra* n. 2, at 110–112; see also Royal Commission Report ¶¶ 735–749, at 256–261.
*Gardner, 39 Ohio St. L. J., *supra* n. 2, at 125–127, n. 229 (quoting Texas Rep. Ben Grant).
Id., at 127.
*See, *e. g.*, 1968 Hearings, at 21; 1972 Hearings, at 396–397; Teeters 451–452; Gardner, 39 Ohio St. L. J., *supra* n. 2, at 127–128.
*See, *e. g.*, *Chaney* v. *Heckler*, 231 U. S. App. D. C. 136, 139–140, 718 F. 2d 1174, 1177–1178 (1983), rev'd, —— U. S. —— (1985); Royal Commission Report ¶¶ 727–749, at 257–261; Gardner, 39 Ohio St. L. J., *supra* n. 2, at 128–129.

appear to have rested on inaccurate factual assumptions and that no longer embody the meaning of the Amendment. *Gregg* v. *Georgia*, *supra*, at 173 (opinion of STEWART, POWELL, and STEVENS, JJ.). For the reasons set forth above, there is an ever-more urgent question whether electrocution in fact is a "humane" method for extinguishing human life or is, instead, nothing less than the contemporary technological equivalent of burning people at the stake.